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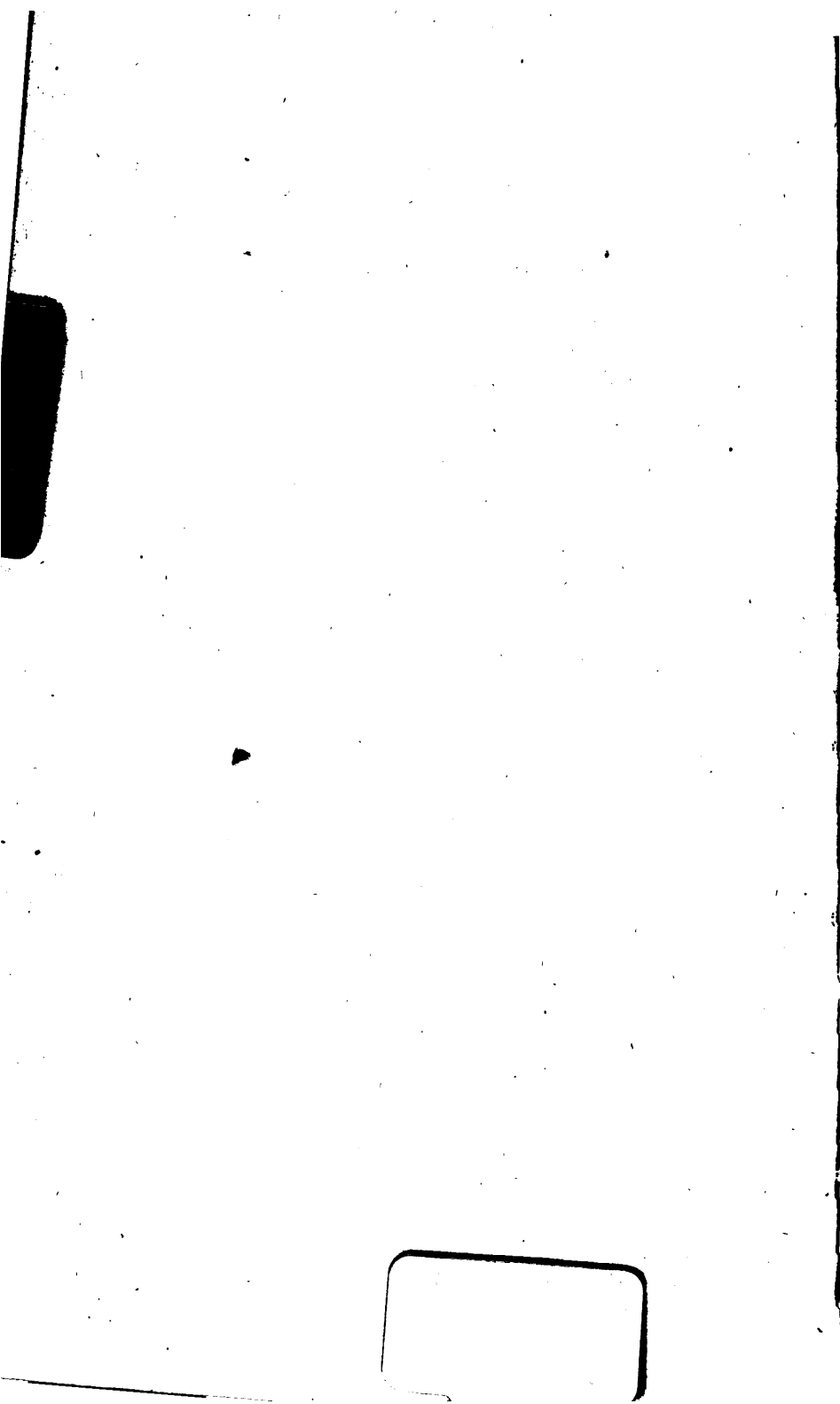
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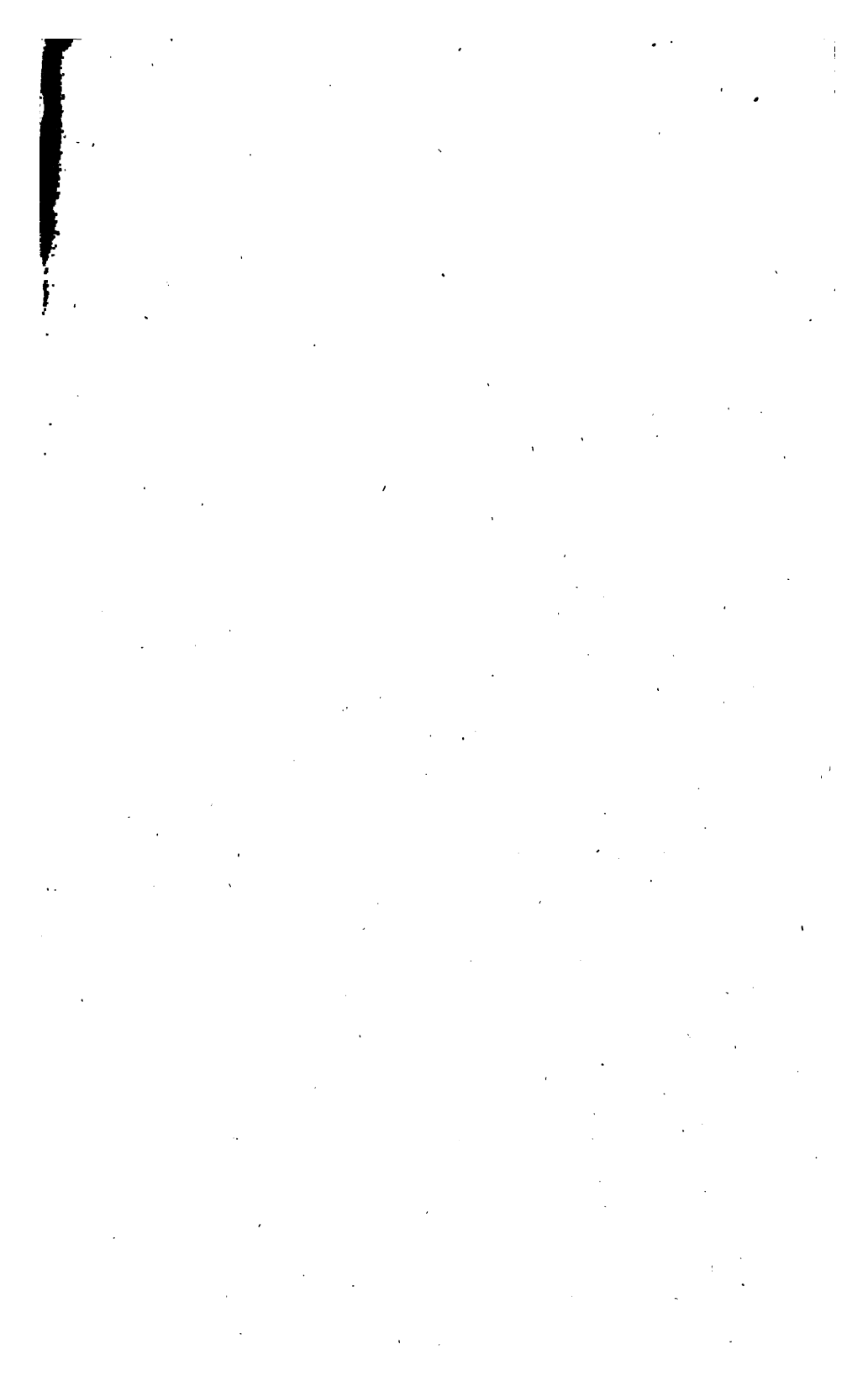
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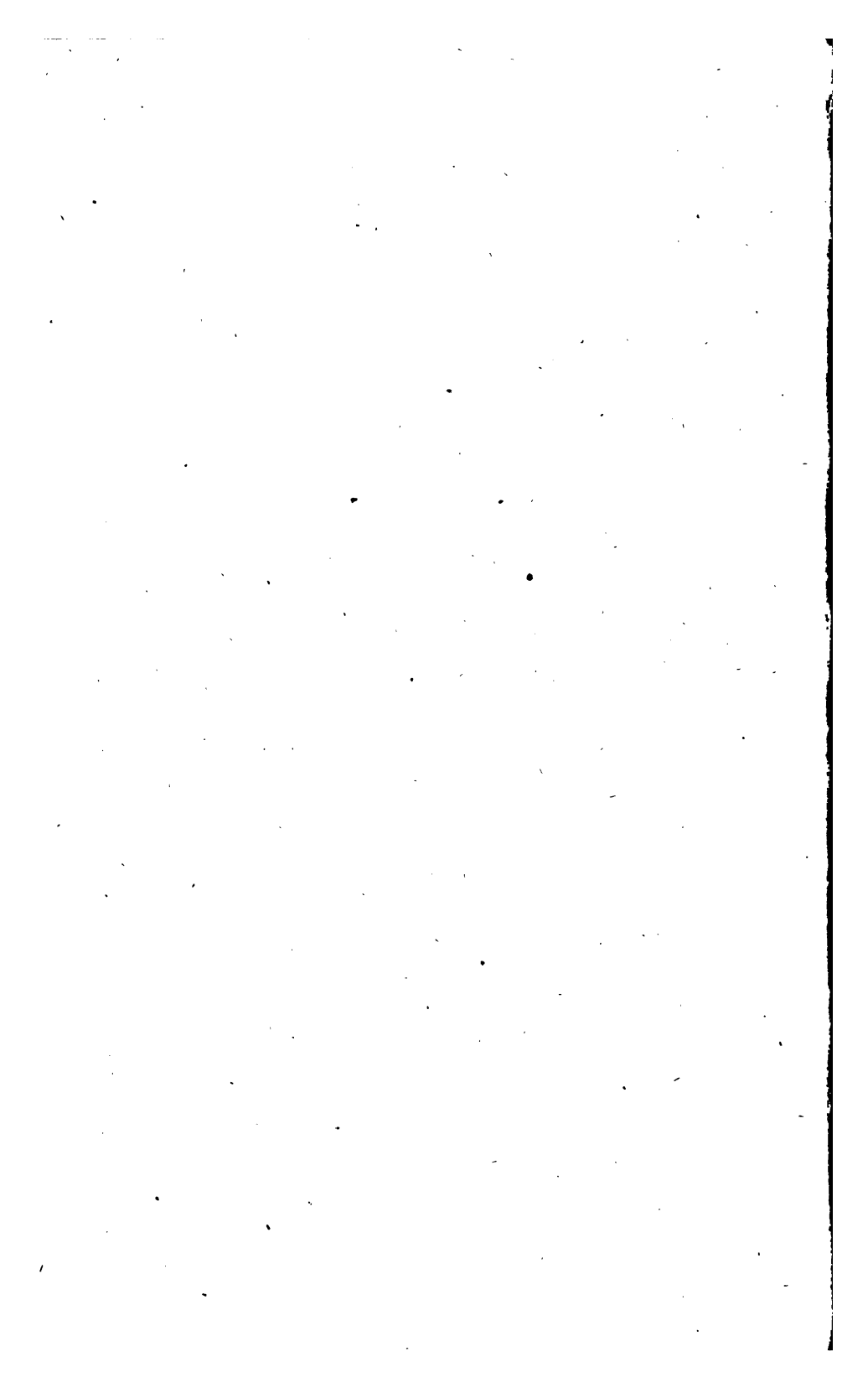
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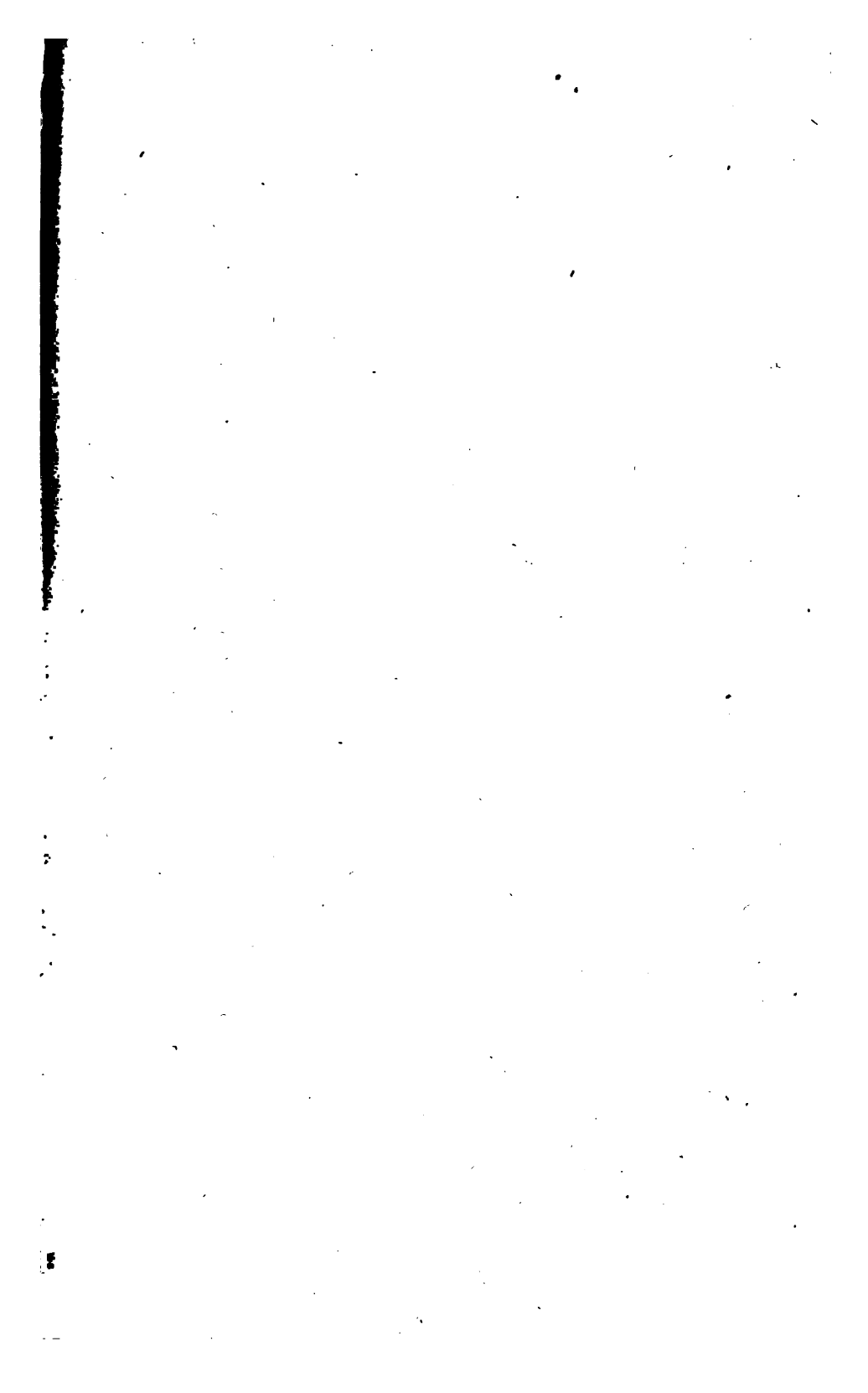
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RULES OF EVIDENCE

ON

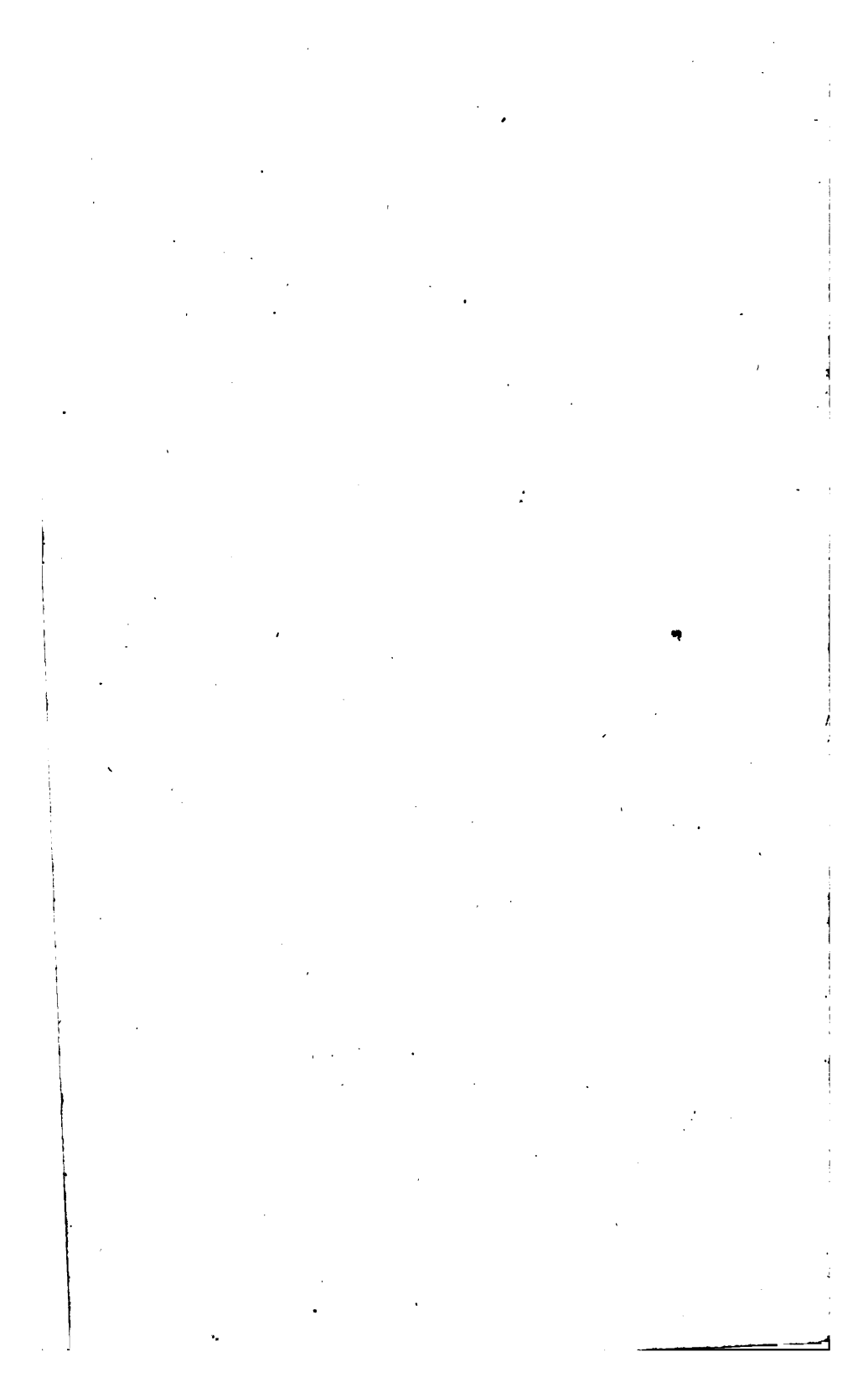
Pleas of the Crown.



RULES OF EVIDENCE

ON

Pleas of the Crown.



THE
RULES OF EVIDENCE

ON

Pleas of the Crown,

ILLUSTRATED FROM

PRINTED AND MANUSCRIPT

TRIALS AND CASES,

—<<>>—
BY LEONARD MAC NALLY, ESQ.
BARRISTER AT LAW.
—<<>>—

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УВАЖАЮЩЕГО ОБОЗНАЧЕНИЯ

THE
RULES OF EVIDENCE

ON

Pleas of the Crown.

BOOK III.

OF WRITTEN EVIDENCE.

LORD Chief Baron GILBERT makes a question, which of the two, *written* or *unwritten* evidence is to be preferred in the scale of probability, when they stand in opposition to each other.

CICERO, says the learned judge, in his declaiming for *Archias*, gives a handsome turn in favour of unwritten evidence: pleading for the freedom of the poet, when the tables of the enfranchisement were lost; he says,—“But here you demand the production of the “archives of *Heraclea*, which it is known to us all perished in the Italian war. Ridiculous! to have no “reply to the evidence in our possession; and to demand “that which it is impossible we should have! to disregard the recent information of men, and to insist on “the authority of registers! and when you have the “illustrious sanction of a man of the first eminence and “honour, the uncorruptible testimony of a free city, “to require proof from tables, which yourselves acknowledge to be often corrupted!”

But, says GILBERT, the balance of probability is certainly on the other side; for the testimony of an honest man, however fortified by the solemnity of an oath, is vulnerable to the imperfections of memory; and as the remembrance of things fail and go off, men are apt to entertain opinions in their stead; and therefore the argument turns the other way in most cases, for contracts reduced to writing, are the most certain and deliberate acts of the mind, and are more advantageously secured from all corruption, by the forms and the solemnities of the law, than they possibly could have been if retained in memory only. *Gilb. Evid. by Loft, 7.*

NOTE—The first chapter of the second book is equally introductory to this. The principle there laid down pervades and directs the reception or rejection of every matter offered in evidence, and the application of every rule; that is, that in order to obtain for the jury legal demonstration, the best evidence that the nature of the charge is capable of must be given. *Vide book 2. ca. r. 342, to p.*

CHAPTER I.

Of Similarity of Hand-writing.

Rule the First.

THOUGH mere comparison of hand-writing is admissible evidence under particular circumstances, resulting from the necessity of the case in civil actions, yet it is not admissible evidence on criminal prosecutions.

GILBERT, C. B. supports the antiquity and justice of this rule. He says, that the comparison of hands only, should be proof in a criminal prosecution, was never law, but in the time of *James the second*, and the distinction has ever been taken, that the comparison of hands is evidence in civil, but not in criminal cases. *Gilb. Evid. by Loft, 54.*

The

The reasons why the comparison of hands is evidence in civil matters, is, because men are distinguished by their hand-writing as well as by their faces; for it is very seldom that the shape of their letters agrees any more than the shape of their bodies; therefore the comparison of hands serves for a distinction in civil commerce; for the likeness does induce a presumption that they are the same; and, the presumption is evidence, till the contrary appears: for every presumption that remains uncontested, hath the force of an evidence; for slight proof on the one side will outweigh the defect of the proof on the other: but in criminal prosecutions the presumption is in favour of the defendant, for thus far is to be hoped of all mankind, that they are not guilty in such instances, and the penalty enhances the presumption. Now, the comparison of hands is no more than a presumption, founded only on the likeness, which may easily fail; because they are very subject to be counterfeited. Therefore, when the comparison of the hands is the *only* evidence in a criminal prosecution, there is no more than one presumption against another; which weighs nothing. *Gilb. Evid. by Loft, 54. Vide rule 3, in this chapter.*

In the KING, *v.* sir HENRY VANE, *Trinity, 14 Car. 2. B. R. anno 1662.* The warrant for the execution of Charles 1. was produced, and evidence of the hand writing of sir Henry Vane was received, though the witnesses, Thomas Lewis, and Thomas Turner, only swore to their belief, neither of them affirming that they saw him write it. *2 St. Tr. 442.*

In the KING, *v.* ALGERNON SIDNEY, tried for high treason, *B. R. Mich. 35 Car. 2. anno 1683,* before sir GEORGE JEFFERIES, C. J. the court received as evidence, similitude of hand-writing.

The attorney-general (sir Robert Sawyer) examined sir Philip Lloyd, as to where he found certain papers then produced; and the witness said, I had a warrant from the secretary, by the king and council, to seize Mr. Algernon Sidney's papers, and pursuant to it, I did go to his house, and such as I found there I put up. I found a great many upon the table, amongst which were these;

I suppose it is where he usually writes ; I put them in a pillow bier I borrowed in the house, and that in a trunk. I desired colonel *Sidney* would put his seal upon them that there should be no mistake ; he refused, so I took my seal and sealed up the trunk, and it was carried before me to Mr. secretary *Jenkin's* office. When the committee sat, I was commanded to undo the trunk, and I did so, and found my own seal upon it ; and I took the papers out of the bag I put them into before.

Q. Was colonel *Sidney* present when you seized these papers ? A. Yes. Q. Are these some of those papers ? A. Yes—I verily believe it.

Attorney-general. In the next place I think we have some papers of his particular affairs, which will prove his hand. Call Mr. *Shepherd*, Mr. *Cook*, and Mr. *Cary*.

Attorney-general, (to *Shepherd* who was sworn). Look upon those writings (*showing the libel*)—are you acquainted with colonel *Sidney's* hand ? A. Yes. Q. Is that his hand-writing ? A. Yes, sir, I believe so. I believe all these sheets to be his hand. Q. How came you to be acquainted with his hand ? A. I have seen him write the indorsement upon several bills of exchange.

Colonel *Sidney*. My lord, I desire you would be pleased to consider this, that similitude of hands can be no evidence.

Mr. *Cary* being sworn. I never saw him write, to my knowledge, more than once in my life ; but I have seen his indorsement upon bills, and it is very like that.

Lord Chief Justice. Do you believe it his hand, as far as you can guess ?

Mr. *Cary*. My lord, it is like what came to me for his hand-writing.

Lord Chief Justice. And you believe it to be his hand-writing ? A. Yes.

Lord Chief Justice (to Mr. *Cooke* who was sworn) what say you, Mr. *Cooke* ? A. My lord, I did never see colonel *Sidney* write ; but I have seen several notes that have come to me with indorsement of his name, and we have paid them, and it is like to this.

Lord Chief Justice. And you were never called to account for mispayment ? A. No, my lord.

The

The libel was read.

Colonel Sidney, (in his defence said,) I am not to give an account of these papers. I do not think they are before you, for there is nothing but the similitude of hands offered for proof. There is the like case of my lady Carr some years ago: she was indicted of perjury, and as evidence against her, some letters of her's were produced, that were contrary to what she swore in chancery, and her hand was proved, that is to say, it was like it: but my lord chief justice Keeling directs the jury, that though in civil cases it is a proof, yet it is the smallest and least of proofs; but in criminal cases it is none at all. As to these papers, I do not think I am to give any account of them. The similitude of hands is nothing: we know that hands will be counterfeited so that no man shall know his own hand. 3 *St. Tr.* 802, 806. 2 *Hawk. P. C. ca.* 46.

On the trial of the seven BISHOPS, *B. R. Trinity, 4 Jac. 2. anno 1688*, present sir ROBERT WRIGHT, C. J. HOLLOWAY, POWELL, and ALLYBONE, justices; for a libel. The question whether similitude of hands, be evidence in a criminal case, was fully debated, and the judges were divided in opinion.

Levinz, Pemberton, and Pollexfen, of counsel for the bishops, objected to the admissibility of such evidence. They insisted that proof by comparison of hands can not be received in a criminal case. In such case, the witness swearing to his belief, from comparison of writing, could never be convicted of perjury. To prove handwriting, only by those that saw letters but never saw the defendant write, did not even amount to so much as comparison of hands. In every petty cause depending on the comparison of hands, the rule was to bring some of the party's hand writing, which might be proved the party's own hand, and then it is to be compared in court with what is endeavoured to be proved; and, upon comparing them together in court, the jury may determine. And, therefore, as to this evidence; first, we say comparison of hands ought not to be given at all in cases of criminals; and it was never heard that it should. In the next place, if it be admitted to be evidence, yet it is not such an

an evidence as that by comparison of hands the jury may take notice of it; for in such manner of proof by comparison of hands, the usage is that the witness is first asked, concerning the writing he produces, "Did you see this writ by the defendant?" (whose hand they would prove) if he answers "yes, I did," then should the jury, upon comparison of what the witness swears to, with the paper that is to be proved, judge whether those hands be so like as to induce them to believe that the same person writ both; and not that the witness should say, I had a letter from such a person, and that is like the hand of that letter, therefore I believe it to be his hand. It is of great moment whether in a case of a misdemeanor, either in an indictment or information, comparison of hands be evidence proper to be offered. The King's Bench adjudged the contrary, upon an indictment for forgery, against lady Carr, as appears in *Syderfin's Reports*. They offered to prove letters written by her to Carr. The court rejected it; and gave their judgment that it was no evidence, and that for this reason, because of the evil consequence of it: "for," say they, "it is an easy matter for any man's hand to be counterfeited, and daily experience shews how easily that may be done." Is it not easy then to cut down any man in the world by comparison of hand? And proving that likeness by comparing it with something that he hath formerly seen. This strikes mighty deep; the honestest man in the world and the most innocent may be destroyed, and yet no fault to be found in the jury or in the judges: if the law were so, it were an unreasonable law. As to the case of SIDNEY, that was a case of treason. Now in the case of treason there is always other evidence brought, and this evidence comes in but as a collateral evidence, to strengthen the other; but in this case it is the single evidence, and proved only by what another believes. Now shall any be condemned by another's belief without proof? That was never evidence yet to convict any one. So that their proof fails in both points: for, first it ought to be considered whether comparison of hands be evidence in a case of misdemeanor? And next, if it be evidence, whether you will take it, that

that the *belief* of a man that brings nothing to compare with it, or never saw the party write, but has received letters, and says this is like it, and therefore he believes it to be his hand, be good evidence as a comparison of hands.

The Attorney General, Sir Thomas Powis, denied the introduction of such evidence to be new, for that nothing was more usual than for a witness to say he knows the hand of the party, for he has often seen his hand-writing, or received letters from him, and that he believes the paper shewn to be his hand-writing. This is evidence given every day. *Sidney's* case was apposite. It is insisted that was evidence, because found in his study; but that was not the reason, for a book of another man's writing may be found in my study; and, he insisted upon it, in his own defence: but the answer was that it should be left as the question—whether the jury would believe it upon the evidence that was given of its being his own hand writing? And so in this case, though it be not so strong evidence as if we had brought those who saw the defendants write the libel, yet evidence it is; and, whether it be sufficient to satisfy the jury, may be a question; but no question, it is good evidence in law.

The Solicitor General, Sir William Williams, same side, put the case of *Algernon Sidney* as in point. He was indicted for high treason, and the treason insisted on was a writing supposed to be his, it having been found in his study. The question was, whether it was his hand-writing, or no? There was no positive evidence that it was his hand-writing; there was no evidence produced to prove it to be his hand-writing, for there was no one that swore that they saw him write it; there was nothing proved but the similitude of hands. Aye, but says *Mr. Serjeant Pemberton*, it was found in his study. Will *Mr. Serjeant Pemberton* be content that all the libels that are found in his study shall for that reason be adjudged to be libels, to be his hand-writing, and he to be a libeller for them? He will declare against that. What was evidence in one man's case will be evidence in another's. God forbid there should be a distinction in law; and therefore this is good evidence.

Pemberton,

Pemberton, Serjeant. The court in *Sidney's* case went upon this, that it was found in his study, and compared with letters and bills of exchange produced in court, which were sworn to be of his hand-writing. *Ante* 396.

Solicitor General. The proof was no more than by comparison of hands, they had no other proof, and that was objected to as being fallible. Paper with paper, it is true, would make the proof something stronger, if in such a case as this such evidence could be produced. Which is the better evidence, men produced who are conversant with these lords, and acquainted with their hand-writing, and who though not willing to give evidence, swear it all to be the hand-writing of the archbishop of *Canterbury*, as they believe, which is as far as any man can swear who did not see the thing written. Now what was the objection in *Sidney's* case but what is here? That any man's hand might be counterfeited. In that case *Mr. Wharton* undertook to counterfeit that hand presently, and that he who was to swear the comparison should not know which was the one, and which was the other: that was stronger than this yet, *Sidney* lost his life on that comparison, so there is a precedent. They say the proving similitude of hands is no evidence, unless you prove the actual writing. What a condition then will England be in when witnesses are dead. Is it not the common practice to produce witnesses to prove such men are dead whose names are set as witnesses to deeds, and that they believe the signature to be the hand-writing of these witnesses? Can there be any greater evidence of such a case, unless it be the confession of the party himself.

POWELL, Justice, said, the counsel for the crown had not sufficiently proved the paper to have been subscribed by the bishops to entitle it to be read. It is too slender a proof in such a case. In civil actions slender proof is sufficient to make out a man's hand, by letter to a tradesman, or a correspondent, or the like; but in criminal cases, such as this, if such a proof be allowed, where is the safety of any man's life. I think there is no danger at all to the government in requiring good proof against offenders.

WRIGHT,

WRIGHT, C J. thought there was proof enough to have the paper read; and said he was not afraid nor ashamed to say it, for he knew he spoke with the law. Let what would be said of criminal cases, and the danger of people's lives, there was more danger to the government if such proof were not allowed to be good: Here is my lord archbishop and the bishop of St. *Asaph*; and my lord of *Ely*, their hands are proved: It is proved to be my lord archbishop's writing by Mr. *Brookes*, and he proves my lord *Ely*'s hand by comparison, and so my lord of St. *Asaph*'s. Then they come and say, we will prove the hands of the others by comparison; and for that they bring witnesses that say, they have received letters from them, and seen their hand-writing several times; and comparing what they have seen with this very paper, says the witness, "I do believe it to be his hand."—Can there be greater evidence; or fuller?

ALLYBONE, *Jurist*. Comparison of hands is the objection; but then what is the inconvenience insisted upon? If a man be accused by comparison of hands, where is he? He is in a lamentable case, for his hand may be so counterfeited that he himself may not be able to distinguish it. But consider the other side. That may be an objection in matter of fact that will have very little weight if compared and set altogether: for, on the other side, where shall the government be if I will make libels and traduce government with prudence and discretion, and all the secrecy imaginable? I'll write my libel by myself—prove it if you can—that's a fatal blot to the government, and therefore the case is not the same, nor is the doctrine to pass current here, because every case depends upon its own fact. If I take upon me to swear I know your hand, the inducements are to myself how I came to know it so as to swear it. Knowledge depends on circumstances. I swear that I know you, yet I may be under a mistake; for I can have my knowledge of you no other way but from the visibility of you, and another man may be so like you that there is a possibility of my being-mistaken—but that is good evidence. Now here are several that swear to my lord archbishop's hand-writing; as to some of the others, the

evidence is not so strong, but there is enough to induce the reading of this writing.

HOLLOWAY, *Justice*. As this case is, there ought to be more strong proof, for the proof ought to be stronger and more certain in criminal matters than in civil matters. In civil matters we do go upon slight proof, such as the comparison of hands, for proving a deed or a witness's name, and a very small proof will induce us to read it; but in criminal matters we ought to be more strict, and require positive and substantial proof, as is fitting for us to have in such a case, and without better proof it ought not to be read.

The court being divided, evidence of similarity of hand-writing was rejected.

NOTE—Immediately after the revolution, the attainder of ALGERNON SIDNEY was reversed by parliament; the act reciting that "whereas *Algernon Sidney*, esq. in the term of St. Michael, in the thirty-fifth year of the reign of our late sovereign lord *Charles the Second*, in the court of *King's Bench*, at *Westminster*, by means of an illegal return of jurors, and by denial of his lawful challenges to divers of them for want of freehold and without sufficient legal evidence of any treason committed by him, there being at that time produced a paper found in the closet of the said ALGERNON, supposed to be his hand-writing, which was not proved by the testimony of any one witness to be written by him, but the jury was directed to believe it by comparing it with other writings of the said ALGERNON, and besides that paper so produced, there was but one witness to prove any matter against the said *Algernon*, and by a partial and unjust construction of the statute, declaring what was his treason, was unjustly and wrongfully convicted and attainted, and afterwards executed for high treason."—This act was passed on the petition of PHILIP earl of LEICESTER and HENRY viscount SIDNEY, brother to the earl.

Therefore in the KING v. CROSBY, alias PHILIPS, B. R. 7 Will. 3. before HOLT, Chief Justice, &c. for high treason. The principal point of treason charged upon the defendant being the writing of several treasonable papers, which the king's counsel endeavoured to prove,

prove, by comparison of hands, having no other evidence; the defendant produced a copy of the act of parliament for reversal of the attainder of *Algernon Sidney*, esq. in which it was declared that the comparison of hands is not legal evidence. And the jury acquitted him. *Skinner*, 578, 579. 1 *Lord Raym.* 39, 40. S. C. 12 *Mod. S. C.* Vide *Henley's Case*, 2 *Co. Inst.* 408. 10 *St. Tr. Append.* 42. *St. 1 Will. & Mar.* 8 *St. Tr.* 472.

In Sir JOHN FENWICK's case, before the *Commons of England*, on a bill of attainder, 8 *Will.* 3. the same point was made and given up by the counsel for the bill. 6 *St. Tr.* 79, 80.

Rule the Second.

But though mere comparison of hand-writing be not evidence on an indictment or information, yet papers found in the custody of the defendant, and the writing thereof being proved to be in his hand, by persons who have seen him write, is sufficient *preliminary* evidence to intitle the counsel for the crown to have them read.

As in the case of lord PRESTON, and others, at the *Old-Bailey*, *January Sessions*, 2 *Will. & Mary*, anno 1690, before HOLT, C. J. Papers found in the defendant's custody being produced, several witnesses were called to prove the hand-writing to be his; some had never seen him write, but had seen his writing, yet their evidence that they believed the writing shewn them to be his hand, was not objected to. And Mr. *War*, who swore he had seen him write, but not very often, though he had seen him write his name and some letters, weakened his own testimony by observing, when he was desired to look upon the papers, and to say whose hand he believed the writing to be, answered that one paper seemed to be like lord *Preston's* hand, but of the other he could not say so much, because what he commonly saw him write was a large fair hand, and that shewn him was small. 4 *St. Tr.* 447.

From the above it appears that those who believed the writing to be lord *Preston's*, had never seen him write; and the witness who had seen him write did not swear he

believed the writing to be his. Yet this evidence, the very year after reversing of the attainder of *Algernon Sidney*, was received in a capital case by lord HOLT.

In the *KING v. FRANCIA*, *Old-Bailey January Sessions*, 3 *Geo. 1. anno* 1716; and, in *LAYER's case*, *B. R. 9 Geo. 1. anno* 1722. PRATT, C. J. says, "Can any thing in the world be an authority more express than that of my lord *Prestan*, where all the papers which were in his *custody*, and taken out of his custody, were read without any *offer or proof* that they were his hand." 6 *St. Tr.* 279.

This case very strongly supports the last rule. Mr. *Staunton*, a witness for the crown, was asked, whether a paper produced was shewn to the prisoner, or any question asked him about it, when he was before the lords of the counsel; and after several other questions, put for the purpose of shewing an acknowledgment of the writing by the prisoner, the witness answered, that the prisoner did not expressly own the paper to be his hand-writing; nor was he asked the question. Neither did he deny it to be his hand-writing; but it was taken for granted to be so by the lords, and the prisoner made no offer to deny it.

Mr. *D'Oyley*, another witness, deposed, that some papers produced were, he believed, the prisoner's hand-writing; for that he was acquainted with his hand, he being his clerk about fourteen years hence, and that he had received letters about five years past which he believed were written by him; then the papers were produced to be read, which was opposed by the counsel for the prisoner, because similitude of hands was no evidence.

Hungerford and Kettleby, counsel for the prisoner, submitted that the papers offered could not be read. That the evidence had not brought them home to the prisoner, as there was no legal proof that they were in his hand-writing; and, consequently, that he could not be affected by any thing that was in them. Likeness of hands was no evidence, and the examination before the counsel (which he stated) did not give an inference that he had owned the papers to be his hand-writing. The only evidence,

evidence, therefore, which can intitle those papers to be read, is the likeness of evidence of hands, which is no evidence at all. In lady *Carr's* case it was refused, yet that was not a capital case, but a misdemeanor only. It was perjury. They stated the act for reversing *Sidney's* attainder, and the evidence on the trial, and considered that act and lady *Carr's* case as unanswerable; the reason assigned in the act reversing the conviction and attainder being that they were founded on similitude of hands. They insisted that the mere belief of a man who had not seen the prisoner write for fifteen years, nor received letters from him for five, was not evidence to affect a man's life. Nothing was more changeable than a man's hand-writing. No man could swear to his own hand for such a length of time, and concluded with again urging the reversal of *Sidney's* attainder as an authority incontrovertible, and produced an attested copy thereof to the court. *Ante* 402.

Pengelly, Serjeant, and the *Attorney General*, *Sir Robert Raymond*, for the crown, answered, that later authorities than those mentioned, and the constant course of evidence since, intitled them to read the papers offered as evidence, and cited lord *Preston's* case. Lady *Carr's* case, they said, did not support the objection, because the letters there produced were not in the direct instance of the perjury. As to the act reversing *Sidney's* attainder, it takes notice that a paper was found in the closet of *Sidney*, and was read, without proving it to be in his own hand-writing; but this paper was not found without an owning and acknowledging by the prisoner. He delivered it to Mr. *Mason*, a witness, had it in his custody, and it proceeded from him. They cited lord *Preston's* case in point, wherein there was only evidence of belief that some of the papers found on lord *Preston* were in his hand, and they were read, though they were the express overt acts laid in the indictment. The answers given by the prisoner at the council they considered as tantamount to a confession. In *Sir Henry Vane's* case the warrant given in evidence against him was proved by only one witness, who believed it to be his hand; but here is a particular fact which amounts to a confession,

feſſion, and is proper evidence for the jury to conſider whether it be a confeſſion. They denied that any caſe could be ſhewn wherein it had been determined that proof of hand-writing by a witneſs who ſwears he has ſeen the perſon write, and he believes the paper produced to be his hand-writing is not a ſufficient proof in a criminal proſecution, that ſuch paper is in the defendant's hand writing—before lady Carr's caſe. In all actions ſuch evidence hath been conſtantly allowed, and they aſked what law or what reaſon has made a difference between *civil* actions and *criminal* proſecutions? Lady Carr's caſe is dark and obſcure. She was indicted for perjury in an answer in chancery. What is ſaid in her caſe about a letter does not appear at all to relate to the matter in iſſue; the determination muſt have been, that an answer in equity, on oath, ſhall not be falſified by a letter only under the party's hand, and that ſuch a letter ſhould not be ſufficient evidence to convict of perjury. As to colonel Sidney's caſe, it did not appear that the paper found was intended to have been ſent out of his cloſet: but the reaſons recited in the act for reverſal of his attainder were accumulative; every ſtep taken in that attainder was complained of, and there is no particular ſtreſs laid on the proof of the paper. They then ſtated the act verbatim (*Ante* 402.) and agreed that the nature of the evidence they offered to prove the paper proffered to the court to be in the defendant's hand-writing, ſtood clear of any material objection that could be raiſed from the act. This paper was not barely proved by compariſon of hands; here is a witneſs who often ſaw him write, and ſwears it to be his hand-writing: beſides the queſtions propoſed to the priſoner and his answer amounts to a confeſſion.

Sir JOHN PRATT, C. J. It is proved by the witneſſes that theſe papers were in Mr. Loyer's poſſeſſion. That he delivered them to Mrs. Maſon, that ſhe locked them up in her trunk ſealed, as they were delivered to her by Mr. Loyer, and afterwards taken out of her trunk by the meſſengers, ſo that if they reſted here, and no other evidence had been given, the papers ought to be read, as being *his* papers, which he *once* had in his poſſeſſion.

Can

Can any authority be more express than the case of lord *Preston*, where all the papers which were in his custody and taken out of his custody were read, without any offer of proof that they were his hand.

This goes further—the paper offered was not only found in his custody, but it is a paper written in his own hand! How do you prove this?

The witness tells you he lived with the prisoner two years, afterwards he received letters from him about business, which business he did according to the directions of those letters, and he believes the paper to be his hand. If they had gone no further, according to the usual course of evidence, this paper should be read. It is objected that the witness can not swear this, because he did not see him write for fifteen years; but he received letters from him five years ago, and the character of these letters he compared with the paper, and from thence he believed that the character of the prisoner's writing is not changed. The witness also answered those letters, and they were about business which he did for the prisoner, and for which he was paid; and, on the whole matter, he believes the writing to be his. This is confirmed by his own confession: but if it had been an independent evidence, it is an evidence sufficient to have this paper read; because, if a witness swears to his belief of a hand-writing, it is always allowed to be read. It must be read as a paper that *was* in his custody, and taken out of the custody of one with whom he had deposited it.

He agreed to the construction on lady *Carr's* case given by the counsel for the crown, and concluded with saying, that if the witness doubted, and could not form a belief whether it was his writing or no, it would not be evidence; for the witness must found his belief stronger, he must say, "I have *seen* him write, and I *know* his writing, and therefore I believe it to be his hand."—And as to the circumstance of length of time when he saw him write, that must be left to the jury. 6 *St. Tr.* 284. 8 *Mod.* 82. *S. C.*

In the *KING v. FLORENCE HENSEY*, *Trinity*, 1 *Geo.* 2. *B. R.* indicted for high treason. *Morton* and *Howard*, the

the prisoner's counsel, took exception to the reading of two papers, being the rough draft of letters found in a bureau where the prisoner kept his linen and papers; and, which were only *introductory evidence*, not any part of the overt-acts which were to support the species of treason charged upon him. It was objected that these papers were not sufficiently proved to be found in his custody, nor sufficiently proved to be his hand-writing; for *mere comparison of hands* is not sufficient to support their being read against the defendant.

The *Attorney and Solicitor General*, counsel for the crown, answered, that the papers being found in his custody, and his hand-writing having been sufficiently proved by persons who had seen him write, it was sufficient to intitle the crown to read them, though the jury are to judge of them. And they mentioned *Løyer's case*, and *Francia's case*, and *Buchanan's case* in the North, 1746, and *Crosby's case*, *Skinn.* 578. 1 *Lord Raym.* 39. S. C. *Ante* . where comparison of hands was allowed to be good evidence, if the papers are found in the custody of the defendant himself. *Sir John Wedderburn's case.* *Fost.* 22. 246. *Sir Cholmeley Deering's case*, i. e. *The King v. Thornside.*

The COURT unanimously over-ruled the objection. These papers were found in his *custody*, and they have been sufficiently proved by persons who have *seen* him write, to intitle the crown to read them. 1 *Burr.* 644.

So in the case of the KING v. DE LAMOTTE, *Old-Bailey Sessions*, 20 *Geo.* 3. indicted for high treason.

The counsel for the prisoner having first objected that similarity of hand was no evidence.

The COURT admitted they were right, but said the objection did not apply to the case. Similitude of hand-writing is, where a paper is produced *not* sworn to by any person who has seen the prisoner write to be as the witness believes, his hand-writing; but *in*fers it to be his hand-writing, because it is like some other writing that is his. But that is not the evidence respecting the written papers offered to be read on this trial. They have all been proved by persons not only acquainted with the prisoner's hand-writing, but who have seen him write,
and

and from that knowledge they say they believe the letters and other written papers are of his hand-writing; and that is the only evidence can be given, except it happens that there be a person who actually saw the prisoner write the very papers produced as the evidence. This kind of evidence has been received in Doctor *Hensley's* case, and in many other cases. *MS.*

In the KING (at the prosecution of JOHN TOLER Esq.) v. JAMES NAPPER TANDY, at bar, *K. B. Ireland, Trinity, 1792*, before lord CLONMELL, C. J. BOYD and HEWIT, Justices. On an indictment preferred by the Attorney General by order of the House of Commons, for provoking the said *John Toler* to fight a duel.

Mr. Toler (now lord NORBURY, *Chief Just. Com. Pleas*) being asked if he was acquainted with the hand-writing of *Mr. Tandy*, answered, "I have seen him write, and have received letters from him. I was as well acquainted with his hand-writing as with the hand-writing of any man in the world."

Here a letter which colonel *Smyth*, *Mr. Tandy's* friend, had delivered to *Mr. Toler* from *Mr. Tandy*, was offered in evidence.

The Recorder of Dublin, (now baron GEORGE) and *Mac Nully*, of counsel for the defendant, objected to this letter being read. They argued that as the evidence offered was merely upon comparison of hands, and a suggestion that the letter came from the hands of *Mr. Smyth*, without any previous ground to shew it was sent by *Mr. Tandy* to *Mr. Toler*, it could not be read. It was settled by concurrent authorities from the reversal of *Algernon Sidney's* attainder to the present case, that, in criminal prosecutions, comparison of hand-writing is not evidence. Papers were read against *Sidney*, because it was sworn that they were found in his possession, in his closet, and when he was present. So in *Hensley's* case, the hand-writing was not only proved, but the treasonable papers were found in his drawer or stopped on their way to the enemy. It was these concurrent circumstances that formed the ground for reading the written papers in these cases; that is, to similarity of writing was added possession of the papers: of course evidence of the hand-

writing of the paper offered can not be given until it is first proved to have come out of the hands of the defendant. They cited 3 *St. Tr.* 802. 2 *Hawk. P. C. ca.* 46. 2 *Bac. abr.* 313. *Viner. abr. tit. Evid.* 243. *Theory of Evid.* 25. 1 *Burr.* 644. *Ante*

BOYD, J. This is not comparison of hands. Mr. Toler says he knows the hand-writing. In *Sidney's* case there was one letter proved, and another given to the jury to compare with it.

The Recorder of Dublin answered: In that case the writing was proved by persons who knew *Sidney's* hand-writing, persons who had received indorsements from him; but the ground for reading was, that they were found in his possession. *Ante*

Mac Nally added—and in *Hensley's* case and *De La-motte's*, tried since in England for high treason, the papers read in evidence as being in the hand-writing of the prisoners, were proved to have been found in their possession. *Ante*

The *Prime Serjeant* (*J. Fitzgerald*), for the crown, answered—That even from the principles on which the objection was made, it could not be contended, that evidence of comparison of hand-writing should not be admitted in criminal cases, though it may sometimes be necessary to prove the papers in the custody of the party, yet no case has been cited to shew that to prove the custody is always necessary. In an indictment for sending threatening letters, proof of the party's hand-writing, and of the letters coming by post, is evidence sufficient for the jury. If the letter be sent by the post to extort money, it will be received in evidence, though the hand-writing be never proved. The distinction, therefore, is unwarrantable, and it would be impossible ever to prove that offence if a man chose to write in his closet and send the letter by post: for how could it be proved in his custody? Then the only proof is similitude of hand-writing, and that is matter proper for the consideration of the jury. In cases of treason and other capital cases, the finding in the custody, together with the hand-writing being proved, made the papers be received, as in *Laver's* case, lord *Preston's* case, and *Hensley's* case. The hand-writing

writing is proved by a person acquainted with it, and though the gentlemen have come armed *cap-a-piè* with authorities, they have not shewn a single case where such evidence was rejected for an offence not capital. He cited *Gilb. Evid. by Loft. 54. Ante*

Emmet, for the defendant.—We are armed with such a case; the case of the seven bishops. The hand-writing of three of these great and good prelates were proved by witnesses acquainted with their hand-writing; and if the distinction taken by the prime serjeant had any foundation, what would have been the consequence? This—that the writing offered in evidence would have been proved against those whose hands were proved, and not as against those whose hands were not proved; but it was not read against any of them. What said justice HOLLOWAY?—"that proof in criminal cases should be stronger than in civil suits. There we go upon slight proof, but in criminal cases we require positive and substantial proof. Is the evidence offered positive and substantial proof, or any thing but belief?" Harken to justice POWELL's expression, who was the pride and pillar of the court: "Slender proof is admitted in civil cases; but in such cases as this, to admit evidence of hand-writing by persons acquainted with his hand-writing, where is the safety of your life or the life of any man here?" This was the case of misdemeanor; the case of a libel. The first case where the doctrine as to similitude of hand-writing is laid down, is *lady Carr's* case, obscurely reported by *Siderfin*. But in perjury, proof of hand-writing is not allowed, and that destroys the distinction between cases capital and not capital. All similitude is comparison, because what does a man swear to, but that by knowing the character of the particular man, he believes the paper to be his writing, from the similitude to or comparison with those characters. The witness swears to this letter by having seen others, and by comparing it with those others. As to what is cited from the new edition of *Gilbert's Law of Evidence*, the part cited is not the text of the original, but the opinion of the editor, Mr. *Loft*, and is not law. He then cited *Hale, P. C. Vide Sidney's case. Ante*

Frankland, for the crown.—Mr. justice *Butler*, who deserves great attention, says, that in the case of high treason similitude of writing is not sufficient foundation for attainder, because there must be proof of an overt-act: but, as corroborating and confirming evidence, even in high treason and other criminal prosecutions, as libels, proof of hand-writing is sufficient, and it is not necessary to have seen the prisoner write. The case of the seven Bishops turned on the witness not knowing the hand sufficiently. *Ante*

Lord CLONMELL.—There is no doubt, and my brethren agree with me that the evidence offered is admissible to the jury. See how it stands. This is an indictment for sending a message, provoking to fight. I, for one, think that evidence much weaker than this is, as stated by the witness, might be admitted. In the first place, if this be rejected, I defy all human ingenuity or exertion to furnish evidence of sending a challenge. Again, the man who delivers the challenge, the second as he is called, he can not be expected to be in the power of the prosecutor. The man who delivers a written message is himself an object of legal punishment: he cannot therefore be examined to criminate himself; but if he could, is it to be expected that he is in the power of the prosecutor? How is writing proved by a man who saw the prisoner write? What is the gist of the prosecution? That he sent a written challenge by *Smyth* his friend. The delivery of the message is proved, and it is stronger here, because the witness knows the hand-writing of the defendant. If this man assumed the character of friend to Mr. *Fandy*, you are open to it. In short there are a variety of ways by which you can shew this letter not to be his hand-writing, if the facts will warrant it.

The letter was read. *Ridgeway's MS.*

In the same case.—Another letter being offered in evidence, *Enmet* again objected to the admissibility of similitude of hand-writing. He considered the present point as differing from the former, but went at large into the law, as being common to both. *Hale* and others, he observed, held that comparison of writing was not evidence,

dence, but there was a different rule certainly laid down by *Buller* in his law of *Nisi Prius*. That rule was not fair, it proceeded on a false principle. The principle is false that makes a difference between the law of evidence respecting treason and any other criminal case, except in these instances, which confirm the general rule, that is where there is a positive statute to make it evidence, or absolute necessity. The distinction taken between cases capital and those that are not, is denied to be law by the most respectable authorities. It has been taken up from the *Obiter Dictum* of *Buller*, but is rejected by *Hawkins* and *Gilbert*. In five cases only have letters been admitted, these are the cases of *Sidney*, of *Henley*, of *Francis*, of *Preston*, and of *Lacy*. They were rejected in the cases of lady *Carr*, and of *Crosby*, and the seven Bishops. In every case in which they were read, it was matter of no importance whether the writing was proved or not, except in *Sidney's* case. In every other case whatever, where they were permitted to be read, there was some collateral circumstance which rendered the proof of hand-writing immaterial. *Sidney's* case was the only exception. There it was admitted to prove his hand-writing, but the reversal of his attainder reversed the principle, and makes the intention of the legislature prohibit evidence of this kind in criminal cases. The act, reversing that attainder, recites, that there was no proof of any treason against him, that the writing was not proved by any witness to have been written by him, not that it was not proved by comparison of hands, for that was the case. Here therefore is a legislative authority that there must be positive proof. Substantial proof (in the words of Mr. justice *Holloway*) that the paper was actually written by him.

How is lord *Preston's* case? He was found in the act of committing treason, independent of those letters which were read: he was arrested going to assist the enemy at war with the king. The evidence was admitted, not to the point for which he was going to be convicted, but as a collateral circumstance, as matter of introduction. His papers were found near him, in the ship with him, in which he was going to France: he expressed a strong desire

desire to have them concealed. It was on that evidence they were read, and not because they were written by him, or proved to be so, but because they were found by him, and upon that principle other letters, not in his hand-writing were also read. *Ante*

Francis's case admits of the same observation as the former. The evidence consisted of a copying book, part in his hand-writing, part not; but both were read, because before the privy council he confessed that the book contained copies of his letters, and explained them: wherefore the lord chief justice said, it is not material whose the writing is, when the prisoner has owned it to be copies of his letters. *St. Tr.*

In *Layton's* case the ground of admission was of the same nature. He used certain expressions before the council, which were considered by the court as a confession, that the letters produced were his, and Mrs. *Mason* proved she received them from him; therefore, besides the circumstance of hand-writing, there were others, his own confession, and being found in his possession. *St. Tr.*

I have not seen the case of *De Lamotte* cited by Mr. *Mac Nally*. *Hensley's* case is the last. Some rough drafts of letters were produced against the prisoner, and what are the grounds upon which the court admitted them? The words of the court are these: "those papers were found
" in his custody, and were proved by persons who saw
" him write." It rested upon their having been found in his possession, and upon that they were admitted. *Ante*

In every one of the above cases there are circumstances to prove the defendant acquainted with the treasonable proceedings; that the written papers flowed from them, and of consequence they would have been admitted without any proof of the hand-writing.

In *lady Carr's* case, in *Crosby's* case, and in the case of the seven Bishops, this evidence was rejected, and it is remarkably unfortunate for the distinction contended for, by the crown lawyers, between treason and other cases, that two of these cases were misdemeanors—therefore their distinction is to be answered thus: All cases

cases in which this evidence was admitted, were cases of treason; and of the cases in which it was rejected, two were misdemeanors. Lady Carr's case, which *Siderfin* has obscurely reported, is mentioned as an authority by *Algernon Sidney* himself in his defence. It comes from him with weight, though he was the party on trial; for had he recited it falsely, the imposition would not have escaped lord chief justice *Jefferies* and the other judges; they were eager, shamefully eager to convict; they caught at every trifle that could affect the prisoner to his injury; but, they did not impeach the case: it was in the memory of them all, and therefore the statement by *Sidney* may be considered an authentic report. *Jefferies* acquiesced in it, and *Sawyer* and *Finch*, the king's counsel, did not even attempt to contradict it. If it be now doubted, see what sir *John Hawles* says of it in his account of *Sidney's* trial: he says, the evidence was irregular in proving the book produced to be the defendant's hand-writing, because it was like what the witness saw him write, which is not evidence: and adverting to lady Carr's case, he says, it was well cited by *Sidney*, and therein it is resolved that comparison of hands is no evidence; and *Windham*, who is described as the second best judge who sat in Westminster-hall, since the restoration to the revolution, was of that opinion. 4 St. Tr. 197. 6 St. Tr. 418.

The same case is mentioned, in the trial of the seven bishops, by *Pollexfen*. He cites it from a note or from recollection, for he mentions facts not noticed by *Siderfin*, and the court rejected and gave judgment, that similitude of hand-writing was no evidence; because, say they, it is so easy a thing for a man's hand to be counterfeited. That case of Lady Carr is particularly relied on as the case of the seven bishops. The hand-writing was there proved by persons who had seen them write, and yet it was not admitted; because, says *Holroyd*, it was necessary to have substantial proof. In *Crosby's* case the prisoner was acquitted, upon producing the reversal of *Sidney's* attainder in parliament; so that here there is a distinction between this and the former case. Here there is no evidence that the letter was sent by

by Mr. *Tandy* to Mr. *Toler*. What is the consequence? Suppose for a moment that he wrote it; that it is proved by persons who saw him write; the inference is, he wrote it, therefore he sent it. That can be but matter of presumption; and the law of presumption is this, the fact to ground the presumption must be proved; but evidence upon belief can never be received to ground a presumption. The fact of writing is not the crime, it is the sending; therefore what is offered is a light and rash presumption; and rash it would be, indeed, for a jury to found a verdict of guilty on this evidence—evidence that admits you may go as far back as you please to raise a presumption.—Will the jury say this—we believe Mr. *Tandy* sent the letter, because the witness believes he wrote it; and the witness believes he wrote it because it is like what he has seen him write.

LORD CLONMELL, C. J. I have asked my brothers if they had any doubt; they are clear that this is evidence admissible to the jury. I know not what the letter contains; it may go in exculpation of the defendant. I gave my opinion before, and my brothers concurred in it. How are the facts? Mr. *Tandy* entered into a correspondence with Mr. *Toler*: he discontinued for some time. Mr. *Toler* received another letter; perhaps it may appear to the jury it was not his work. It may shew that what was before expressed were not his sentiments, but that his intention was different. Let the letter be read: and it was read.—The defendant was acquitted. *Ridgeway's Rep. MS.*

The same rule was followed in the KING v. the rev. WILLIAM JACKSON, tried for treason, B. R. Ireland, 1795. The prisoner's hand-writing being proved by Cockayne, who had seen him write, and who swore the papers produced were, he believed, in his hand-writing. A letter found in the study of Mr. *Stone*, at Hertford, in England, was admitted in evidence against him. *Sampson's Rep. of the trial. Vide ca. on CONSPIRACY. Post.*

And on the trial of Henry and John Shears, esqrs. at a commission of Oyer and Terminer, Dublin, July, 1798, a paper found in an open desk in the house of Henry Shears was admitted as evidence against both; John Dawyer having

having first sworn that he had seen *John Shears* write, and believed the paper to be in his hand-writing. *Ridge-way's Rep.*

Rule the Third.

In proving the hand-writing of a defendant, there is no distinction between that which is legal evidence in a civil action, and that which is legal evidence in a criminal prosecution; that which is evidence in the one, whether a capital offence or misdemeanor, being evidence in the other.

So ruled in the cases of doctor *Hensley* and *De Lamotte* above cited, in the former of which cases Lord MANSFIELD, C. J. says, "It is the common case of proving a man's hand-writing, which is done every day between party and party." Of course the following cases are illustrative of the antecedent rules.

BROADHEAD v. WOODLEY, Clerk, *versus* YEATES, J.
B. R. Worcester spring assizes, 1770.

In prohibition, the plaintiff in support of a *modus pro-*
duced in evidence a paper writing, being a particular of
tithes, &c. in order to shew that this was the writing of
the deceased rector whose name it bore; the plaintiff's
counsel offered to produce many of the returns to the
spiritual court of births and burials made in the time of
that rector, and signed with his name; and upon com-
paring this entry with those returns, it was said it would
appear that the hand-writing was the same. The rector
had been dead many years.

YEATES, J. I have no doubt to reject this evidence
as not admissible. I do not know any case where com-
parison of hands has been allowed to be evidence at all.
No trial can be decided by opinion and speculation, but
by evidence, where a witness has seen the party write,
and speaks to his belief of that writing, which is pro-
duced in evidence. But where it is merely opinion on
the similitude of the writing, collected from barely com-
paring them, the jury may compare them as well as any
body else; and any two people may think differently. In
an indictment for forgery, the evidence of a person who

has seen the party write, is sufficient. The case now in question is not like a rental, *tenier*, old title deeds; these are received without evidence of hand-writing, because of the place they come from which gives them authenticity. Suppose some of the jury can not read or write, how are they to judge of the similitude of hands. I have no doubt but this evidence must be rejected. *Peak's Nisi Pr*, 21.

MACPHERSON v. THOYTES, *Mich. 31 Geo. 3. Guildhall*. Assumpsit on a bill of exchange. Indorsee against acceptor. The bill was drawn by one *Pany*, payable to his own order, and the name of *Pany* was indorsed on it. The plaintiff proved the hand-writing of all the indorsers, except the first. The defendant's counsel insisted that this should also be proved. It was answered that the acceptance was an admission of the hand-writing of the drawer, and that by comparing the hand-writing with the indorsement they would be found to correspond.

LORD KENYON. Comparison of hands is no evidence. If it were so, the situation of a jury who could neither write nor read would be a strange one, for it is impossible for such a jury to compare the hand-writing. The plaintiff was called. *Peak's N. P.* 20.

So in *STRANGER v. SEARLE*, *Easter, 33 Geo. 3. Nisi Prius, B. R. Westminster*. Action against the defendant as acceptor of a bill of exchange. The defence set up by the defendant was that the hand-writing subscribed to the bill purporting to be his acceptance, was a forgery. Two witnesses on the part of the plaintiff proved the hand-writing of the defendant, and swore that they believed it to be his.

Erskine, for the defendant, offered to produce other bills of exchange accepted by the defendant, and which were proved to be his hand-writing, for the purpose of comparing them. This was objected to by the plaintiff's counsel, as it did not appear which was the real hand-writing of the defendant, those bills or those upon which the action was brought both being proved by witnesses, and that it was besides judging from a comparison of hands.

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LORD KENYON ruled that the witness should not be allowed to decide upon such comparison of hands. *Espin. N. P.* 14.

In *GOODTITLE, on the demise of REVET v. BRAHAM*, at bar, *B. R.* 32 *Geo.* 3. Ejectment. Lessor of plaintiff claimed, as heir at law, defendant as devisee of Mrs. *Elizabeth Braham*, the person last seized. The plaintiff stated his pedigree, which was admitted; and the defendant proved the will, which was impeached on various grounds, but chiefly on those of *forgery* and undue influence. There were two parts of the will, to each of which were three signatures and a seal; and with one of them was sealed up a paper purporting to be instructions for the will in the hand-writing of the testatrix, and signed and sealed by her; at the bottom of which was a memorandum that the testatrix, at the time of executing the will, requested the attesting witnesses to sign the paper for her, which she declared to be her writing, and they had signed it accordingly. This memorandum was in the hand-writing of one *Reilly*, who was supposed by the plaintiff to be the contriver of the will and who was considerably benefited by it. The plaintiff's case, as to the *forgery*, consisted of evidence that the testatrix was incapable of writing a paper of such a length as these instructions, and hardly able to sign her name; of declarations in her life time that she would never make any will, and of some contradictions of the attesting witnesses. The Plaintiff then called two clerks of the post-office, who swore that they were used to inspect franks and detect forgeries. They were then asked whether, from their general knowledge of writing, the instructions were a natural or an imitated hand. This question was objected to, but allowed by the court; and the clerks swore that the hand was imitated. They were then asked if they could judge whether the instructions were written by the person who wrote the memorandum. This question was also objected to, as being a comparison of hands, but was allowed by the court.

LORD KENYON, C. J. mentions: a case where a *deceit* had given evidence of the meaning of letters, without explaining the ground of his art, and where the prisoner was convicted and executed.

BULLER, J. said it was like the case of *Wells-harbour*, where persons of skill were allowed to give evidence of opinion. Vide *Chapter on evidence by professional men*, *Ante* 329.

The clerks then swore, that from their knowledge of the similarity of hands they were sure that the instructions and memorandum were written by the same person. They also swore that all the signatures to the will and the signature to a power of attorney to surrender the copyhold to the use of the will executed afterwards were imitated, and not natural writing.

On cross-examination they admitted that they had never detected an imitation of the hand of a very old person who wrote with difficulty, and might be supposed frequently to stop. That their principal means of knowing was by seeing whether the letters were *painted*, that is, gone over a second time with the pen, which they admitted might happen to any person from a failure of ink. Other signatures of the testatrix, proved by unsuspected persons, were then shewn to these witnesses; one of these signatures was sworn to be genuine by one of them, and by the other to be imitated.

Lord KENYON left the question of *forgery* to the jury, on the evidence they had heard, without any observation: and the JURY found for the plaintiff. 4 *Durnf. & Est.* 497, 498, 499.

So in *STRANGER v. SEARLE*, before cited. The defendant called a clerk of the post-office, whose business it was to detect the forgery of franks. He was previously asked by the plaintiff's counsel, if by the bare inspection of hand-writing he could pretend to ascertain whether it was real or imitated. He said that, except in a very few cases, he could only do it by comparison of hands, or by knowing the party's hand-writing; and not knowing the defendant's hand-writing, his evidence was rejected. *Esp. Rep. N. P.* 14. *Ante* 418.

And in the *KING v. JOSEPH CATER*, esq, indicted for a libel, *Maidstone spring assizes*, 1802. *Bowmer and Hume*, officers in the post-office, were admitted to prove that the libels produced were not written in a natural but in a disguised hand. *MS.*

From

From considering the whole of the above chapter, it appears to be settled law, that on proving, by a witness who has seen the party write, that he believes the paper produced to be the hand-writing of the party, such paper may be read in evidence on any prosecution capital or not, and in any civil suit.

Rule the Fourth.

A witness shall not be admitted to prove a writing produced *not* to be the writing of a party, from having seen the party write in his presence, while the action was pending.

So ruled in **STRANGER** and **SEARLE**, above cited. It was asserted that a witness had seen the defendant write several times. *Esp. N. P. 14.*

CHAPTER II.

Of written papers found in the possession of the defendant, or published, or attempted to be transmitted by him, for treasonable purposes.

Rule the First.

WRITTEN or printed papers found in the possession of the defendant may be read against him in evidence, if accompanied with publication. *Vide the last antecedent chapter.*

Rule the Second.

Papers plainly relative to any previous formed design of dethroning or murdering the king may be properly read in evidence as *overt-acts* of that treason, being specially laid in the indictment.

FOSTER on this species of evidence says, how far words or writing of a seditious nature are overt-acts of compassing the death of the king hath been the subject

subject of much debate. In Mr. *Sidney's* case it was said (by *Jefferies*, C. J.) *scribere est agere*. This is undoubtedly true under proper limitations, but it was not applicable to his case. Writing being a deliberate act and capable of satisfactory proof, certainly may, under some circumstances, with publication, be an overt-act of treason; and had the papers found in Mr. *Sidney's* closet been plainly relative to the other treasonable practices charged in the indictment, they might have been read against him, though not published. *Fost.* 198.

BLACKSTONE commenting on the same point of evidence, and contemplating *Sidney's* case, supports the opinion of *Foster*, after shewing that words spoken, however wicked, can not be treason, unless by some particular statute, he says, "yet, if they be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treason; for, *scribere est agere*." But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns, convicted its author of treason: particularly in the case of *Peachum*, a clergyman, for treasonable passages in a sermon never preached. And *Algernon Sidney*, for some papers found in his closet: which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtlessly have been properly read in evidence as overt-acts of that treason which was specially laid in the indictment. But being merely speculative, without any intention, so far as appeared, of making any public use of them, the convicting the author of treason, upon such an insufficient foundation, has been universally disapproved: *Peachum* was, therefore, pardoned; and though *Sidney*, indeed, was executed, yet it was to the general discontent of the nation, and his attainder was afterwards reversed by parliament. (*Vide ante* .) There was then no manner of doubt but that the publication of such a treasonable writing, was a sufficient overt-act of treason at the common law, though of late even that has been questioned. 4 *Blackf. Com.* 81.

FOSTER,

FOSTER, whose judgment *Blackstone* has, in a great measure, adopted, seems to found his opinion on *Hale*, who follows *Coke*. *Hale* says, "those words, which being spoken, will not make an overt-act to make good an indictment of compassing the king's death; yet, if they are reduced into writing by the delinquent, either in letters or books, and published; they will make an overt-act in the writer to make good such an indictment if the matter contained in them impart such a compassing." *Co. Pl. Cr.* 14. 1 *Hale's Pl. Cr.* 118.

FOSTER proceeds: the papers found in lord *Preston's* custody (on board a smack on the Thames, on his way to France) those found where Mr. *Lyster* had lodged them, the intercepted letters of Doctor *Hensley*, were all read in evidence, as overt-acts of the treason respectively charged on them, and *William Gregg's* interrupted letter might in like manner have been read in evidence if he had put himself on his trial. *Foster*, 198. So in *De Lamotte's* case, *ante*. . . and the rev. *William Jackson's* case, *B. R. Ireland. Ante*.

For those papers and letters were written in prosecution of certain determinate purposes, which were all treasonable, and then in contemplation of the offenders, and were plainly connected with them. But papers incapable of such connexion while they remain in the hands of the author *unpublished*, as Mr. *Sidney's* did, will not make a man a traitor: and, lord *Hale*, in the place last cited, mentioneth two circumstances, as concurrent to make words reduced into writing, overt-act of compassing the king's death, that they be *published*, and that they impart such compassing. *Foster*, 198. Vide the King v. *James Napper Tandy. Ante*.

Rule the Third.

Letters wrote and forwarded on their way, for the purpose of a treasonable correspondence, whether found in the possession of the defendant, or intercepted, or stopped in the post-office, may be read in evidence against him on a charge of levying war, adhering to the king's enemy,

intercepted * import

enemy, or compassing the king's death, to prove the treason.

As in LORD PRESTON's case, before cited, papers found in his custody after he had gone on board a boat, on the *Thames*, and was in the act of going abroad, and his conduct evinced evident circumstances of fear and concealment, which argued the intent of his voyage to be of the like nature with that which the letters were called for to prove, and therefore they were read *without* proof of hand-writing.

On this case of lord *Preston* it is justly remarked, by Mr. *Lofi*, that the point *there* was not as it has been sometimes supposed, a case of mere custody, as in *Sidney's* case; but a case of custody and *conveyance*, connected with the overt-act laid in the indictment of passing on the sea, and departing towards the kingdom of *France*, with intent "to deliver the traitorous instructions in the said letters contained, to the king's enemies, in the said kingdom, then at war with England." *Gilb. Evid. by Lofi. 787, 788.*

In DOCTOR HENSEY's case, evidence was given of intercepted letters, the hand-writing of the defendant having been previously proved. 1 *Burr. 646. Ante.*

And this evidence was received on the authority of *Gregg's* case.

So in the KING, *v. the rev. WILLIAM JACKSON, B. R. Ireland, Easter 1795.*

Mr. Lean, a king's messenger, produced a paper found by him in the possession of Mr. *William Stone*, of Old-Ford, England.

Ponsonby, of counsel for the prisoner, objected to the reading of this paper, because it was neither found in the prisoner's custody, nor in the county, nor even in the kingdom where the treason was charged to have been committed, and insisted that the bare hand-writing without any thing else, had never been held to be evidence; and that the rule *scribere est agere* (which lord CLONMELL said was the rule) was never laid down in general terms but in *Algernon Sidney's* case, where the attainder was afterwards reversed by parliament.

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The *Attorney General*, (right hon. *Arthur Wolfe*,) now lord KILWARDEN, C. J. B. R. answered, there is an overt-act laid, to support which two papers are proved in order to shew the purpose of the prisoner, who is the writer, and to give credit to his carrying on a correspondence with the two persons to whom those papers are directed. With that view we offer a paper in the hand-writing of the prisoner, found among the papers of his correspondent *William Stone*, in England, informing him that he was arrived in Ireland, warning him to make no further use of the former addresses on his letters, and other circumstances tending to shew that he was the medium through which such correspondence passed to France. We do not contend that this is to be given in evidence substantially and standing by itself, but in support of the facts stated. The legal distinction is, where a man writes a paper and parts with it, such paper is evidence against him. It is not offered now as an evidence of an overt-act, but as a piece of evidence coming from the party accused, to be made use of currently with other evidence to the same effect, and therefore it should be read. *Vide Henfrey's case. Ante*

Ponsonby, in reply. This, like every other matter offered in evidence, whether oral or written, is either legal or not. It will not do to say it is to make a part of the overt-act, or to confirm the overt-act. An overt-act can not be substantiated by three or four, or nine or ten, or any number of pieces of paper, unless each is in itself legal and admissible evidence; it can not be pieced up in the manner attempted on the part of the crown. And this paper is not proved ever to have been published by the prisoner, nor even to have been in the kingdom of Ireland, much less in the county where he is charged to have committed the treason. What was the determination in lord *Presfon's* case? It was there thought necessary that there should be an overt-act in the county where the crime was committed; and, the court confirmed this objection, in general by shewing, as a reason why in that instance it could not avail on account of the defendant's having taken boat in *Middlesex*, in pursuance of his treasonable design, which they held sufficient of an overt-

act in *Middlesex*, already proved in the county without resting upon the papers found elsewhere.

Downs, J. Lord *Presfon* took boat in *Middlesex*, with the papers on him. And were not the papers admitted against him in *Middlesex*, where the indictment was laid, because they were evidence shewing the intention with which he committed the overt-act in *Middlesex*, namely, the taking boat to go to France.

CLONMELL, C. J. There is nothing said that does not assimilate this case to the case of the *King* against *Hensley*. The evidence offered is either introductory or corroborative. Introductory to what? To one of the counts in the indictment; either for adhering to the king's enemies, or compassing his death. What then is the evidence? That he had given information to the enemy, in order that they might invade the country. You, (the prisoner's counsel) may, perhaps, be able to explain that. Papers are found, and it can not be denied, in the hand-writing of your client and in the hands of his correspondent, to whom, it is proved, that he wrote letters. Therefore this is evidence. How far the contents may go in explanation, or contradiction, can only appear by reading the letter.

CHAMBERLAINE, J. This is read only to shew *quo animo* the letter was directed to *Stone*; and being in the hand-writing of the prisoner is evidence to go to the jury. The only question is, whether a paper in his hand-writing in *England* may not be read to explain that which he has done in *Ireland*. The court over-ruled the objection. *Sampson's Report of Jackson's tri.* 57, 58.

In the same case—After some objection by the prisoner's counsel founded on the rule that the best evidence the case admits of must be produced; the COURT directed to be read a letter in the hand-writing of Mr. *Holford Stone*, at *Paris*, to Mr. *Horne Tooke*, in *London*, to shew the whole connection of a correspondence previously proved. The *Attorney General* having in answer to the objection made, observed that it was the best evidence, and that there could be no better; Mr. *Holford Stone* being out of the reach of the process of the court, and, even were he not, he could not be examined to criminate

criminate himself. But at all events the paper offered having been got on the prisoner's table in Dublin, that is in his possession, it was clearly admissible evidence against him. *Sampson's Rep. Jackson's tri.* 64.

Lord CLONMELL, C. J. in charging the jury in the same case said, and DOWNS and CHAMBERLAINE, justices, concurred, that letters of advice and correspondence of intelligence to the enemy, to enable them to annoy this country, or defend themselves, written and sent in order to be delivered to the enemy, are, though *intercepted* in their progress, overt-acts of treason in compassing the death of the king, and of adhering to his enemies. And then adverting to the case of *Gregg*, before cited, he added, that so it had been determined by all the judges of *England* in that case, where the indictment bore strong resemblance to the present. It was true, in the present case, the letters given in evidence had never reached their intended destination, but were stopped in the post-office; but that does not alter the case: and the reason is obvious and clear, for were that the case, no traitor could at any time be indicted, however mischievous the treason, unless the letters written by him, or attempted to be transmitted by him, had gone to and been received by the person for whom they were intended; in which case the traitor could never be laid hold of, until at least after the mischief was done. *Sampson's Report of Jackson's trial*, 87.

CHAPTER III.

Of written Evidence from the Records and Proceedings of Courts of Law, Equity, and other Courts having competent jurisdiction.

Rule the First.

THE final sentence, decree, or judgment of any foreign court which hath competent jurisdiction of the subject determined before them, is conclusive evidence

in any other court of concurrent jurisdiction; and therefore an acquittal on a criminal charge in a foreign country may be pleaded in bar of an indictment for the same offence in England.

It is a bar, says BULLER, *justice, B. R.* because a final determination in a court having competent jurisdiction is conclusive in all courts of concurrent jurisdiction. Therefore if *A.* having killed a person in *Spain*, were there prosecuted, tried, and acquitted, and afterwards indicted in England, he might plead the acquittal in *Spain* in bar. *Buller's N. P.* 245.

So in the *KING v. HUTCHINSON*, 29 *Car. 2.* (cited in *BEAK v. THYRWHIT*, *Easter, 4 Jac. 2. B. R.* anno 1688.) The defendant had killed a person named *Coslon*, in *Portugal*, and was acquitted there of the murder; being afterwards apprehended in *England* for the same fact, he was brought into the court of King's Bench by *habeas corpus*, where he produced an exemplification of the record of his acquittal in *Portugal*; but the king being very willing to have him tried in *England* for the same offence, it was referred to the consideration of the judges, who all agreed that as he had been already acquitted of the charge by the law of *Portugal*, he could not be tried again for it in *England*, 3 *Mod.* 194. Vide *Beake v. Tyrrel. S. C.* 1 *Showers.* 6. *East.* 1 *Will. & Mary.*

In the *KING v. DAVID ROACHE*, *Old-Bailey, December Sessions, 1775*, the same point is recognized as law. The defendant was tried at a special commission before *BURLAND*, baron, *ASTON*, justice, and *GLYNN*, serjeant and recorder of *London*, for the murder of *John Ferguson*, at the *Cape of Good-Hope*, on the coast of *Africa*.

The indictment was founded on *Stat. 33 Hen. 8. ca. 23.* The prisoner pleaded *autre fois acquit* before *Olaff Martini Begg*, provincial fiscal of the supreme court of criminal jurisprudence there: but withdrew his plea in bar, put in the general issue, and was acquitted. *Leach Cr. Ca.* 2 edit. 125. 3 edit. 160.

autre fois

Justice

Rule the Second.

But the sentence of a civil or ecclesiastical court can not be pleaded in bar in a court of common law to an indictment; nor is such sentence evidence on a prosecution for an offence at common law, or by statute.

Therefore to forge a will, is a capital offence, although the supposed testator is living; and although at the time of the trial the probate was not recalled.

As in the KING, v. JOHN STERLING, *Old Bailey, September Sessions, 1773, 13 Geo. 3.* before NARES and ASHURST, Justices, and GLYNN, *Serjeant and Recorder of London.*

The indictment was for forging the last will and testament of *Elizabeth Shuter*, spinster, with intention to defraud the South-Sea company; with five other counts for uttering and publishing the said will, knowing it to be forged, and charging the prisoner with an intention to defraud, first, *Elizabeth Shuter*; and secondly, *Daniel Crofts*.

The circumstances were—The prisoner *John Stirling* was a young man inhabiting chambers in the temple; and *Elizabeth Shuter*, the supposed testatrix of the will, was his laundress. On the twentieth of February, 1773, the prisoner applied to the clerk of one *Bishop*, a proctor in Doctor's Commons, in order to prove the will of *Mrs. Shuter*, whom he represented to have lived at *Tooting*, in *Surrey*. He accordingly took the oath before the surrogate, and the probate of the will was made out, and delivered to him. On the twenty-second of February, he took the probate of the will to the South-Sea house, and entered it there with the proper clerks, in consequence of which, on the twenty-fifth, he went to the proper offices, and sold out £350 stock.

The will was produced in evidence, in which *Mrs. Shuter* was made to give to her “ dear master and very
“ good friend *John Stirling*, of the middle temple, sole
“ executor, £350, South-Sea annuities, and all her other
“ estates and effects in trust to make sale of, &c. and
“ out of the money arising from such sale, to pay all
“ her

" her just debts, &c. then to retain for his own benefit £30 for his trouble as executor, and divide the residue among her relations," who were specified: and it purported to be signed and delivered by her in the presence of two witnesses.

It appeared on the trial that the *probate* was not recalled.

Elizabeth Shuter was herself produced to prove that the signature to the will was not her hand-writing, and the jury found the prisoner guilty.

The judgment was however respited on a doubt, whether as the supposed testatrix was living, the prisoner was legally convicted of having forged her *last will* and testament, there being no such instrument as a last will and testament in contemplation of law until after the death of the person making it.

But upon the authority of the case of *Ann Lewis*, the judges were unanimously of opinion that an instrument may be the subject of forgery, although in fact it should appear impossible for such an instrument as the instrument forged to exist, provided the instrument purports on the face of it to be good and valid as to the purposes for which it was intended to be made. The prisoner received sentence of death. *Leach. Cr. Ca. 2 edit. 95. 3 edit. 117. Fost. 116. Vide Murphy's case, 10 St. Tr. 183. Post*

NOTE.—In the *Dutcheffs* of KINGSTON's case which follows, all the cases relevant to this point are cited, applied, and argued on.

Rule the Third.

A sentence in the spiritual court against a marriage, in a suit for dissolution of marriage, is not conclusive evidence to stop the crown from proving the same marriage in an indictment for polygamy; for the validity of such sentence may be impeached for having been obtained by fraud.

So ruled in the trial of *Elizabeth dutcheffs* of KINGSTON, before the LORDS of Great Britain, April, 1776, 16 Geo. 3.

The facts on which the indictment was founded were:
Elizabeth

Elizabeth Chudleigh, daughter of colonel *Thomas Chudleigh*, of Chelsea college, was married to the honorable *Augustus John Hervey*, (afterwards earl of Bristol) on the fourth of August, 1744, at the parish church of Lainston, in the county of Southampton, as appears by the register of that place.

On the ninth of November, 1768, she instituted a suit of *jaſtitiation* of marriage against Mr. *Hervey*, in the consistory court of the bishop of London, and on the tenth of February, 1769, sentence was pronounced, "that the said *Elizabeth Chudleigh* was and now is a spinster, and free from all matrimonial contracts and espousals with the said *Augustus John Hervey*."

On the eighth of March, 1769, Miss *Chudleigh* was married, by special licence from the archbishop of Canterbury, to *Evelyn Pierpoint*, duke of Kingston. And on the ninth of January, 1775, an indictment of polygamy was found at Hicks's-hall, county of Middlesex, charging, "that *Elizabeth* the wife of *Augustus John Hervey*, esq. of Hanover-square, in the county of *Middlesex*, being then married, and then the wife of the said *Augustus*, feloniously did marry and take to husband *Evelyn Pierpoint*, duke of Kingston, the said *Augustus John Hervey* being then alive, &c."

The proceeding being removed into the court of King's Bench by writ of *certiorari*, dated the eighteenth of May, 1775; this writ was superceded, and on the eleventh of November, 1776, another writ of *certiorari*, signed YORK, issued to remove the proceedings before the king in parliament.

On the fifteenth of April, 1776, the defendant was brought to trial before the lords. She pleaded *not guilty* to the indictment, and immediately addressed the lords thus: "My lords, the supposed marriage in the indictment with Mr. *Hervey*, which is the ground of the charge against me, was insisted upon by him in a suit instituted by me in the consistory court of the right reverend lord bishop of London, by the sentence of which court still in force, it was pronounced, decreed, and declared, that I was free from all matrimonial contracts

"contracts or espousals with the said Mr. *Hervey*; and, my lords, I am advised that this sentence, which I now desire leave to offer to your lordships, (remaining unreversed and unimpeached) is conclusive, and that no other evidence ought to be received or stated to your lordships respecting such pretended marriage."

The *Attorney General*, (*Thurlow*) first insisting on a reservation of his right to object to the proceedings in the jactitation cause whenever they should be offered in evidence, consented that the whole proceedings should be read; that is, the original allegation of *Elizabeth Chudleigh*; the cross allegation delivered in by Mr. *Hervey*; her answer; the articles on which the proofs were taken; the depositions, and the sentence; and the lords then permitted the proceedings and sentence to be read, *de bene esse*; and by the sentence it appeared that the defendant was declared free from all matrimonial contracts and espousals with Mr. *Hervey*.

Mr. *Wallace*, for defendant, submitted. This sentence is conclusive, as long as it remains in force; and of necessity it must be received in evidence in all courts and in all places where the subject of the marriage can become a matter of dispute. The constitution of the kingdom has placed the decisions of the rights of marriage solely in the ecclesiastical court. The common law courts have no such original jurisdiction; though marriages may come incidentally before them: but where the proper forum has given decision upon the point, the common law courts have never examined into the grounds or questioned the validity of the sentence. He cited a case of jactitation in the arches, in the reign of Will. 3. *Cartberr* 225. *Bunting v. Addingsball*. 27 Eliz. 4 Co. 29. *Kenn's case*, 7 Rep. 41. *Blackham's case*, 1 Salk. 290. *Hatfield and Hatfield. Viner, tit. Marriage. Before the lords of England. Clews v. Bathurst*, 2 Stra. 960. *De Costa v. Villa Real*, 2. Stra. 961.

The above cases, he observed, respected cases of marriage, but the jurisdiction of the ecclesiastical courts was the same in other instances; as in the probate of wills, and granting letters of administration. He cited *Noel v. Wells*,

Wells, 19 Car. 2. 1 Lev. 235. and *Bransby v. Kennick*, 1718. *before the Lords, an Appeal from Chancery*.

He then argued that the same rules obtain with respect to every court of competent jurisdiction, whether foreign or domestic. The common law courts give credit to the decisions of all foreign courts of points within their proper jurisdiction, and do not examine into the facts, but are concluded by the sentence. In support of this rule he cited,

HUGHES V. CORNELIUS, B. R. on a judgment of the French admiralty, *Mich.* 34 Car. 2. *Sir Thomas Raym.* 473.

It is the same in case of insurance; and in respect to the courts of admiralty; whether prize or not prize, belongs to that court, the jurisdiction of that court decides upon the subject.

So the local customs of foreign countries. *Burrow v. Jamieno*, 1 *Stra.* 233.

He insisted that in almost every case where judgments or records of other courts have been the subject of discussion, the sentences of the ecclesiastical court have always been cited and argued, as conclusive upon the subject in dispute, and the courts have uniformly adopted those cases at law; but the attempt has ever been to distinguish cases immediately before the court from those determined by the ecclesiastical jurisdiction. So in *Philips v. Bury*. *Sinn.* 468.

He next cited BIDDULPH FARMER V. ATHER. *Trinity*, 28 & 29 Geo. 2. *Com. B.* In which case the chief justice said—If there is a sentence in an ecclesiastical court declaring a marriage, if it could be proved by a hundred witnesses that the parties were never within five hundred miles of each other, the evidence is not to be received, but the judgment of the ecclesiastical court is conclusive upon the point. 2 *Wils.* 23.

He then observed that though the cases he had cited respected civil suits, yet no real ground of distinction could be made between criminal and civil proceedings. In civil suits, courts go as far as possible to relieve claims founded in equity and justice: in criminal cases, the leaning is always to the defendant, and therefore such

evidence is stronger in a criminal prosecution. In support of this he cited —

The KING *v.* VINCENT. *Old-Bailey*, 8 *Geo.* 1. Indictment for forging a will of a personal estate. On the trial the forgery was proved, but the defendant producing a probate, that was held to be conclusive evidence in support of the will, and the defendant was acquitted. 1 *Strange* 481. But vide the KING *v.* STERLING. *Ante*

KING *v.* RHODES, 12 *Geo.* 1. *B. R.* The same doctrine was held. Defendant exhibited a bill in *Doctors Commons*, as executor, and demanded probate. After long contest it was determined in favour of the will; and upon an appeal to the delegates this sentence was confirmed. After the sentence, the parties who brought it about fell out, and discovered that the will which had been proved was a forgery. The manner of giving relief was to grant a commission of review; but the person who had been injured and disappointed by this forgery, also preferred a bill of indictment against the persons concerned in the act of forgery. The Chief Justice refused to try the cause whilst the sentence was in force; but insisted that it should stand off until the sentence was laid out of the case by the decision of the commissioners under that commission of review. 1 *Strange* 703. Vide the KING *v.* STERLING. *Ante* 429.

The KING *v.* GARDELL was also in point. It was an indictment prosecuted by Mr. *Crawford*, a fellow-commoner of *Queen's College*, for an assault. At the trial the defendant, who had acted by orders of the college, produced the acts of the college, by which *Crawford* had been expelled. The JUDGE declared, that as the college had the sole jurisdiction of the cause, their decision was conclusive upon him; and it did not signify upon what grounds they had gone; for the effect of their judgment was an excuse for the defendant, and so long as it remained unimpeached and unreversed, there could be no doubt but it furnished protection to the defendant, or to speak more properly, a defence against the indictment. The cause was brought before the *King's Bench*, and the judges there were unanimously of opinion that the court had

had done right at the trial of the cause to reject all evidence upon the ground of these acts of expulsion; that the acts themselves, being within the jurisdiction of the college, were sufficient for the defendant to avail himself of, and that it was not competent to the prosecutor of that indictment to shew to the court that these were not regularly or orderly done, or that they were invalid in any respect whatsoever. And in that case the general doctrine was recognized, that in all courts of competent jurisdiction, their acts, however wrong they are, yet while they remain in force, are conclusive upon every other court: the cases of ecclesiastical sentences, and many others, were then mentioned.

He called the attention of the lords to the cases in *Exchequer* seizures, where condemnations are given constantly almost without a defence, and yet all other courts are concluded by them: and under all those authorities, for a succession of ages, he rested that the court would conceive that the sentence of the ecclesiastical court produced, in a case clearly within their jurisdiction, in a case in which they had the sole jurisdiction, was conclusive.

Mr. *Mansfield*, on the same side, stated the proceedings in the ecclesiastical court in obtaining the sentence of jactitation: and argued that if that sentence had the force which it was apprehended it must have, it would of course follow that the indictment must fall to the ground; because the sole foundation of the criminal charge being the supposed marriage of the defendant with Mr. *Hervey*, this sentence, if conclusive, unanswerably proves such marriage never existed. Then it follows, as a consequence, that this is the proper place and point of time to stop the trial. Evidence ought not to be heard, if this sentence is conclusive, because it would be hearing that which could have no intention, no weight, no consequence, so it would be nugatory to state it.

To shew that the sentence was conclusive, he took into consideration the statute on which the prosecution was founded, and the state of the law before it was enacted. The act creates no new offence. It punishes nothing but what was punishable before, a second marriage, while a

former existed; and this has been an offence as long as the ecclesiastical constitution of this country has subsisted. The statute makes no other alteration in the law, but as it subjects persons committing this offence to temporal prosecution and punishment before this act, such an offence could only be the object of ecclesiastical censure and punishment; and the statute never intended to break in upon or alter the rights of the ecclesiastical courts. The preamble shews it was not the intent of the legislature, that a second marriage should be the object of punishment where there had been a sentence which prevented a supposed former marriage being binding upon the parties. The preamble says, that divers evil-disposed persons being married, run out of one country into another, or into places where they are not known, and there become to be married, having another husband or wife living, to the great displeasure of God and utter undoing of divers honest mens' children and others. But it never was supposed by the makers of the statute that the persons described in the preamble would go through the form and ceremony of a trial, and obtain a decision in the ecclesiastical court before such second marriage was to take effect: but it is enough that in this act there is not any thing that tends to diminish or break in upon the dominion of the ecclesiastical courts, but that the statute left those courts, and the law relating to them, just in the same situation as they were before. Now if this was an offence before the act, how was it punishable? What would have been the operation of such a sentence before this law? Unquestionably a person taking a second husband or wife, the first being living, might have been made the subject of punishment in the ecclesiastical courts; but so long as the sentence remained, the relation of husband and wife could not exist, which alone must be the foundation of a prosecution: for the offence of taking a second husband upon this statute, the act upon which the whole proceeding is founded having made no alteration in the case, the law remains the same. Yet such a sentence in the ecclesiastical court would not have made adultery lawful, or have made a marriage with a second husband or wife a good one;

but

but while the sentence subsisted, it would have proved that there was no first marriage at any time by any parties interested. Such a sentence as this may, however, be undone; for it is a fundamental rule in the ecclesiastical courts, that *sententia contra matrimonium non transibit in rem judicatam*.

He then pointed out that the courts ecclesiastical might, on the application of any person interested, allow the institution of a new suit to set aside a former sentence, and on new evidence establish the marriage formerly dissolved, from which he argued that the lords were not to conclude that by sanctioning the sentence produced, they either authorized adultery or gave effect to second marriages while first marriages subsisted; for at any time such marriage might be established, notwithstanding a sentence against it, when any person should think fit in a legal way, in such judicatures, to impeach that sentence: but what he contended for was this, "that while the sentence remains, the matter is concluded; the marriage can not be proved to exist; the relation of husband and wife is destroyed."

Now, if this is well founded in the known practice and law of these courts, the consequence will be, that this sentence must now have the effect under a prosecution on the act of parliament, as it would have had in a prosecution in the ecclesiastical court for an adultery or a crime against the first marriage.

The cases cited he considered as proving his conclusions; so did the rules of the courts of common law. In every instance in which an issue is joined in those courts upon matrimony, they decide not: they send to the spiritual courts to have the matter decided upon. So in cases of dower, where it is denied that the widow was lawfully married, the temporal courts refer the question to the spiritual, and the decision of the bishop is final. So on questions of legitimacy where bastardy is alledged. So on the probate of wills, and even on an indictment of forgery, a decision of the ecclesiastical court on the validity of the will was held conclusive. The decisions of the court of *admiralty* are likewise conclusive; and those of the court of *exchequer*, concerning the revenue; and there are many other instances in which, after sentences
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of courts having competent jurisdiction, all other courts are shut out from inquiry into the matter, however it might appear that such sentences are not founded in truth.

It may be said in answer to these arguments, let such sentences be final and conclusive as they may, yet if a sentence be the effect of agreement and collusion, it shall not be final, nor have a binding force; but if there be any ground to impute to this sentence such original as the courts of common law call coven, or collusion, this is not the place in which such collusion ought to be inquired into. Those courts which have the decision of matters relating to marriage are fully equal to the decision of such collusion, they may undo their own sentences; and it is not to be presumed that they would encourage collusion, and they will on any occasion review their sentences when applied to by persons interested.

He then argued that the marriage in question was not such as the statute of *James* made an object of punishment. The preamble recited that the statute was made on account of temporal mischiefs; and though such offence was charged to be against God and religion, yet if that had been the only evil apprehended from such marriages, the legislature would have left them to have been punished where all other offences against religion are cognizable and punishable. It was the temporal mischief that produced the law; but no temporal mischief could arise from giving to the sentence sufficient weight to stop the prosecution; for that sentence could not injure any human creature who did not chuse to acquiesce under it; for the remotest issue might commence a suit in the spiritual court, in order to get rid of it. Give it therefore its utmost force in favour of the defendant, it would only go to prevent a prosecution where the marriage undone was of such a sort that no human creature would have an interest to support it.

He then cited cases to shew that collusion was not the subject of temporal inquiry; but that such inquiry ought to be confined to the spiritual courts. *Kenn's case*, 7. Rep. 41. *Morris and Webber*. Moore 225. *Hatfield v. Hatfield*.

His

His next object was to shew, from legislative authority, that a collusive judgment in the spiritual court could not be set aside, but is final and conclusive. For this purpose he cited *stat. 9 Hen. 6. ca. 11.* intitled "Proclamations before a writ be awarded to a bishop to certify bastardy," by the preamble of which it appears that a certificate of bastardy, though obtained by flagrant coven and collusion, is said to have such effect that it ought, by the law of England, disinherite heirs and their issue forever: and then it provides that "to eschew such subtilie disinheritions it is ordained, that in case of a certificate of mulier, no manner of certificate shall be in anywise put to prejudice, bind, endamage, or conclude any person but him or his heirs that was a party to the plea." And then it goes on to enact, that in future all proceedings of this sort shall be attended with different proclamations that are ordered by that act, that it may in future be known when such certificate will be applied for to the spiritual courts, and that all parties interested may have notice to make their objections.—Then does it not appear by this law, that the certificate or decision of the ecclesiastical court, in a case of bastardy, even though founded upon collusion, was decisive, when once it was formally received from the ecclesiastical judge? And if it was so, will it be a stretch of the authority of that judicature, now to say, that a sentence in a cause of marriage, which is as peculiarly to be confined to their jurisdiction, ought to have the same force! And if it is not to have the same force, will it not be breaking in upon or evading that jurisdiction in a way never before done, if the House of Lords should now suffer this sentence in another place to be impeached and overturned.

He then stated the *KING v. FAR*, where the decision of the spiritual court upon a will is held to be decisive upon the clearest proof of forgery. *Kelyng 43. 1 Siderf. 254.*

To presume that the parties knew they were married, and that that consideration brought the defendant within the statute of *James*, would, he said, be an impeachment of the sentence; but another reason shewed the

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was not within the act : the act did not mean, in all cases to punish a second marriage, where the former husband or wife were found to be living, as where one of the parties is beyond the seas for seven years, with the knowledge of the other party ; and as to the immorality of the case, as to the effect against religion and against the eternal sacred obligation of marriage, it remains exactly the same, whether the husband be on this side of the channel or the other. He then reviewed the several points he had made and concluded—"that upon the authorities of law there was no ground to attach or impeach the sentence ; that it was final and conclusive, of course no other evidence ought to be received impeaching the marriage ; that the indictment therefore must fall, and that as no evidence could be received, it would be idle, impertinent, and of no use to state it.

Doctor Calvert, same side, agreed that when judgment is given by any court having original and direct jurisdiction, though that may incidentally come before another court, that other court can not go into that question which has by a competent jurisdiction been before determined. From this he agreed, that as ecclesiastical courts alone can determine an original question of marriage, no other court can examine their sentence ; and cited *Kenn's case*, and the case of *Corbet*. *Coke* 48. *Ante* 439.

He urged, that persons not parties, but interested in the sentence of jactitation might interfere or appeal within a proper time, and that the party against whom the sentence was obtained might appear afterwards and produce proof, and be heard upon it ; the reason of which indulgence was, that by the canon law a marriage was held to be indissoluble, and therefore a sentence against it could never be final. If therefore any body appears who apprehends himself injured in the decision, and has an interest to shew that the judgment was not duly obtained, he may be heard ; but while such a judgment remains unimpeached, it is conclusive. The authorities shewed that when a sentence determining on the point of jactitation of marriage has been offered in any court coming in incidentally, it has been constantly received,

received, but with this restriction, it must be where the marriage has been directly in issue; for if it be an incidental point only, it would not then be satisfactory. He cited *Blackman's* case in point.

He contended that the present case was within the principle above laid down, the sentence under consideration being a direct determination on a marriage, and therefore not liable to the objection he had stated; and that being a direct determination, it was conclusive in a court of common law, as fully appeared by the cases cited. While a sentence of this kind existed, a wife could not be heard to have any claim on her husband; she could not claim the restitution of conjugal rights; there was no light in which she could be understood to be the wife, until the marriage was again brought into question. He cited *Millesent v. Millesent*, and *Mays v. Brown*, in the *Prerogative Court*, 1771.

The question for the determination of the lords would be on the marriage said to be had with Mr. *Hervey*; but it was clear that any determination that might affect that right, might affect not only the persons immediately parties to that suit, but the many connections, relationships, and new claims that arise upon marriage might be precluded by such a sentence. Suppose the duke of *Kingston* had issue by his marriage, it would be as much their interest to establish this sentence, as it would be the interest of any other to impeach it; and that such rights as these should be determined in a criminal jurisdiction where the parties can not be heard, is a position that never was yet maintained. *Rex v. Vincent*. 1 *Str.* 481. *Ante*. The *King v. Rhodes*. 1 *Str.* 703. cited by Mr. *Wallace*, as the *King v. Roberts*. *Ante*.

So in the *KING v. PERRY*. The above cases were recognized at the *Old Bailey*. The judge offered to put off the trial, if the prisoner had a mind to plead the sentence of the ecclesiastical court, which he refused. But this case does not impeach the former determinations; because if the probate was not insisted on by the defendant, consequently not over-ruled by the court, these cases remain in full force, and prove the principle contended for; that in a criminal court cases of this sort ought not to be gone into.

Will it be said that this being a prosecution under a special act of parliament, the crime consists in having married two persons, that the marriage must necessarily come under the consideration of that court which is to determine the crime? and they can not by the act of parliament itself acquire an original jurisdiction to inquire into the right of marriage? Does it not apply exactly as strong to the case of forging a will, for it is by express act of parliament made death to forge a will; and it may as well be argued from hence that every criminal court has by that act acquired an original jurisdiction as to wills. It can not be argued that a criminal court has jurisdiction of marriage; the court must necessarily inquire into facts, but it can not originally entertain such a question; and therefore it can not have an original jurisdiction upon the fraud and collusion. If any court is ever permitted to inquire into the question, it must be a court having concurrent jurisdiction, and then the question will be seen on a different ground, because a court having concurrent jurisdiction has also the opportunities, and all the methods of inquiring into the original question. They being competent to determine the original point, it makes no considerable difference whether it comes before them first or whether it has before been determined by another court. A criminal court has no concurrent jurisdiction with the ecclesiastical court; it can never entertain the abstract question, whether parties are man and wife; the only way that question can be taken up is incidentally; and the authorities shew, that where an incidental question arises, if it has been determined by a court having original jurisdiction, it ought to be conclusive, and that rule applies to the case now before the lords. For those and the other reasons given, the House of Lords will not recede from established and legal principles, or make a precedent; but if there is good ground in law to say that this sentence ought to be conclusive to the point to which it is offered, the prosecutor will not be permitted to go into evidence.

Doctor *Wynne*, same side, having stated the case, submitted among other reasons that the marriage was the only

only fact that can make any criminality in the case; and if that fact has been already decided on, and that decision is still in force, the prosecutors are barred from going into evidence upon it. He argued from all the cases and positions before cited, and urged the great confusion that must arise, if the sentences of courts were not allowed to take effect, but that the matter might be examined over again, and a subsequent sentence be given in another court contrary to the sentence first given by the original jurisdiction, the former sentence remaining unrepealed. This he illustrated by instances to prove the inconvenience and absurdity of such practice in civil cases; and then argued that in criminal cases the same rules should bind as in those of a civil nature, as the evil effects in such cases would be still greater. It could not, he said, be held in any case, or in any country that a sentence which would be held to be conclusive evidence to avoid a civil demand, would not be held to be conclusive evidence and defence against a criminal prosecution. *In penalibus causis benignius interpretandum est*, is a maxim of universal law.

To shew the extraordinary and unusual steps which have been sometimes taken by courts in cases similar to the present to avoid a contrariety of sentences of courts having different and distinct jurisdictions, he cited two cases—

BOYLE v. BOYLE, B. R. 1687. The spiritual court against a woman, *causa jactitationis maritagi*. The woman prayed a prohibition to the ecclesiastical court, and the suggestion was, that this person, who now libelled against her in a cause of jactitation, had been indicted at the sessions in the *Old-Bailey* for marrying her, he having a wife then living; that he was thereupon convicted, and had judgment to be burnt in the hand, and therefore they had no right to proceed, and a prohibition was prayed. Serjeant *Levintz* in that case moved for a consultation, because no court but the ecclesiastical court can examine the marriage. Upon the contrary, it was said that if a prohibition would not go, then the authority of these two courts would interfere, which might be a thing of ill consequence: that if the lawfulness

nese of this marriage had been first tried in the court christian, the other court, at the *Old-Bailey* would have given credit to their sentence, and upon this ground and this principle merely, that there might be a contrariety of sentences which would be mischievous. The court certainly went a great way, for it prohibited the ecclesiastical court from proceeding in a marriage cause *inter vivos*, of which it has the clearest and most uncontroverted jurisdiction. 3 *Mod.* 164.

FURSMAN v. FURSMAN. This cause began in the consistory court of *Exeter*. It was a cause of restitution of conjugal rights brought by the woman. The libel was admitted; and then there was an appeal to the court of *Arches*. The judge pronounced for the appeal, and was proceeding upon the merits of the cause; but upon the fourth of November, 1727, he was served with a prohibition. The ground for obtaining the prohibition was, that *Sarah Furzman* pretending to be the lawful wife of the said *Furzman* had indicted him for bigamy in marrying another wife, and failed in proof of her own marriage; whereupon the said *Furzman* was acquitted, and therefore it was the said ecclesiastical court should not proceed.

Now if a prior judgment in a matter in which a court can have only an incidental partial jurisdiction is a sufficient cause for stopping all subsequent proceedings in the same case, even in the court which has the entire ordinary jurisdiction over the question, on account of the ill consequence that would ensue from the interference of the authority of the two courts, surely by parity of reasoning, in a case where it appears that the court, which the law and constitution have entrusted with the entire jurisdiction over the matter in question, has already taken cognizance of it and pronounced its sentence, the court of incidental jurisdiction will give credit to such sentence, and conform its own sentence to it. Surely this court will not, by bill of indictment set the sentence of the ecclesiastical court entirely at nought, and brand an open and solemn marriage, consummated by a cohabitation and reputation of years with the name of a felony. A court of justice will not hazard such confusion

confusion and scandal upon any suggestion or apprehension of error in the former sentence, or fraud in obtaining it, but will leave it to be examined by the ecclesiastical court, which only had jurisdiction to examine. In support of this he quoted *Sanchez de Matrimonio. lib. 7. disp. 109. ca. 1.*

Mr. Attorney General (THURLOW) now lord THURLOW, for the crown. The point is new, and no principle has been stated to support it. The prisoner being arraigned and indicted for felony, has pleaded not guilty, and issue is joined. In this state of the business, she moves that no evidence shall be given or stated to prove that guilt upon her which she hath denied and put in issue. *Jones v. Bosu* is the only case cited to support the motion, but it bears no relation or proportion to the present case. In the trial of an ejectment, the defendant admitting the plaintiff's title to be otherwise clear, avoided it by a sentence against the pretended matrimony of his mother with Sir Robert Carr; after which both parties married with other persons; a sentence unimpeached in form or substance against his own mother, from whom he was to derive title to his state; decisive, consequently, as a fine with non-claim or any other perfect bar; and submitted to accordingly, for the plaintiff was called and did not appear. *Carth. 225.*

Here, if the sentence should ever come properly under examination, it will appear to differ in all those respects.

If this sentence be, as argued, a definitive and conclusive objection to all inquiry, it ought to have been pleaded in bar; or it may be relied on in evidence of not guilty: but it can not stop the trial.

This being unprecedented, goes a great way to conclude against it. To say that such a rule would be inconsistent with the plea, and repugnant to the record as it now stands, seems decisive. After putting herself for trial upon God and her peers, she beseeches you not to hear her tried.

Upon the general ground of the debate he observed, that every species and colour of the guilt was admitted; so that the court would take the crime to be proved, with every

every base and hateful aggravation it might admit; the first marriage solemnly celebrated, perfectly consummated; the second wickedly brought about, by practising a concerted fraud upon a court of justice to obtain a collusive sentence against the first, a circumstance of great aggravation. When *Farr* and *Chadwick* defended a burglarious breaking and entering, under a pretence of an execution, upon a judgement fraudulently obtained against the casual ejector, it was thought to aggravate their crime, and they suffered accordingly. *Old-Bailey sessions, April, 1665. Kelynge, 43. 1 Siderf. 254. S. C. Raym. 276. Folt. 77.*

The sentence being collusive is a nullity: if fair, it could not be admitted against the king who was no party to the suit. If admitted, it could not conclude in this sort of suit, which puts both marriages in issue. The objections arise from the general nature of the sentence propounded, which is never final; from the parties who could not by their act bind any but themselves, or those who are represented by them, or at most, those who might have intervened in the suit; from the nature of the present indictment, which puts the marriage directly in issue, from the circumstances peculiar to this sentence, which prove it to be collusive.

Without adverting much to those particulars, the counsel for the prisoner affected to lay down an universal proposition: that all sentences of peculiar jurisdictions are not only admissible but conclusive evidence, and referred to many cases not applicable.

Burrows v. Jamineau is nothing to this purpose. The plaintiff insisted upon recovering, because if the acceptance (made in *Leghorn*), had been made here, it would have bound; but according to the law of that place where it was made, the acceptance did not constitute a contract. The plaintiff might, if he had been advised otherwise, have defended that suit; he acquiesced in the decision. 2 *Str.* 733. *Ante*

Courts of *admiralty* sit between nation and nation. They proceed in *rem*, but they bind the property not only against the apparent possessor, but all the world, or else the very existence of the court would be subverted.

Therefore

Therefore in *Hughes v. Cornelius* the plaintiff failed in his action of trover, although the verdict found his property, and consequently the sentence of the *French* admiralty erroneous; because the court had no jurisdiction over that sentence. The same reason applies to *Green* and *Waller*. There is no appeal but to the sword. Vide *Ante*

The same principle governs as to seizures in the *Exchequer*, where any person may come in and claim; which, if they neglect, they tacitly assent to the condemnation. So of seizures freed before the commissioners of assize. Vide *Ante*

He then answered the several other cases by pointing out their irrelevancy to that before the court. Insisted that sentences which are given by the bishop, or his official, by his own mere authority, had no pretence to bind or influence any question which may arise after in judicature: for such causes punish no crime, try no right, proceed to no civil effect, but only *pro salute animæ* to reform some enormity or neglect in religious life: and shewed from the *decretals* that such sentence can not be final. In all civil causes, he observed, the maxim is universal, *expedit reipublicæ ut finis aliquis sit litium*. In proceedings *pro salute animæ*, the reason of the thing is on the other side.

The acknowledged futility of such sentences and the arguments drawn from them not being final to shew that they were conclusive upon the court, he treated with ridicule: the argument he said was this—all the world shall be bound by that judgment, which the court who pronounced it hold for no judgment, and will suffer to bind nobody. But such was the necessity of the argument, to give it any effect they were forced to assume, that this sort of sentence is the judgment of a civil judicature on a civil subject, which is not true; and to give it effect against others than parties, they were forced to admit that such others may set it aside, which is true, only because it is no such judgment.

He then observed upon the several cases stated on the other side. On that of the *King v. Vincent* he observed, the citing of it was an attempt to shew that the authority of

of the ecclesiastical court had been interposed between public justice and the crime of forgery; but in that case the support of the will was not in question. It was produced in common form, which is not binding even in the spiritual court. 1 *Roll. Rep.* 21.

In that case of *Vincent* the question was not whether the sentence should have credit in respect to the understanding which the spiritual judges have in the rules and course of their own law, but whether a probate granted of course, on the oath of the very party charged with the forgery, shall be a full and conclusive bar to the prosecution. This is too monstrous to be left upon the authority of a short and single case, without condescending to explain what consistency it holds with public justice. What respect to common sense, will allow the crime of forgery or perjury to be defended by the allegation of that very fraud which the indictment meant to publish; not stating any trial or judgment upon it, but merely that it had been practiced? If the pretended executor had repelled the objection of forgery, even in that court, it would have borne some countenance at least, but the fraud passed without examination, where in the nature of the proceedings none could be had.

The *King v. Rhodes* proves nothing, for it was merely a question of direction, whether the court would proceed to try the forgery of an instrument, while the property to be affected by it remained *sub judice*. 1 *Bra.* 703.

Ante

This is a matter of great consequence to public justice; at the same time it is the sort of case which must happen frequently. The fraud was frequently practiced in the late war upon sailors; and if this rule had existed, could never have been punished. He then quoted *Stirling's* case in contradiction to those cited; and concluded his argument on those criminal cases by observing he could not bring himself to imagine it would be entertained as a serious opinion, that the mere perpetration of a crime may be pleaded in bar to a prosecution for it. This is certainly not for the interest of justice, nor for the honour of the spiritual court, because it would take away
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from that jurisdiction one guard against falshood and fraud of which every other is possessed.

Whatever may be said in the instance of forgery, perjury, and other frauds upon the spiritual court, where the criminal court may seem to impeach their sentences, without assuming any jurisdiction in the matter of them; in this case it is impossible to alledge, that the criminal court is not fully competent to decide upon the whole matter of the indictment, particularly on both the marriages there stated as constituting the crime.

It had been laid down, that this crime was formerly punished by the canon law, and in the ecclesiastical court; and that transferring the punishment of it from the ecclesiastical to the temporal jurisdiction should not prejudice any defences which the party might have set up in the first court. In order to make that observation bear, some proof should have been added, that this sentence would have barred such a suit however promoted, *exceptione rei judicata*. Then supposing this jurisdiction no better than concurrent, this court might have been barred, *pari ratione*. But it is already established from ecclesiastical authorities that no such exception would lie in that law, and the same thing is no less true in our law where the court can by any means take consueance of the right of marriage. As in *Dower*, *Robins v. Cruichley*, 2 *Wils.* 118, 127.

Nay the very statute on which the indictment is framed proves the same thing. It excepts the cases where the former marriage is dissolved, or declared void by sentence, or was contracted under the age of consent; all which, otherwise, would have been liable under an indictment for felony. *Stat. 1 Jac. 1. ca. 11. Irish Stat. 10 Car. 1. ca. 21. 2 Stat. at large, 82. sec. 1.*

He then answered several of the other cases cited on part of the defendant, and observed upon them that more perverse inferences were never extorted from any cases than from these. A court of *Oyer and Terminer* is to determine without hearing, for this special reason, that it will be final. A court of direct, complete, and exclusive jurisdiction, is to be bound and governed by one

of no jurisdiction, either direct or indirect, on the matter. A court which decides once for ever, is to be bound by one which never decides. The sentence remains open for further examination; let it therefore be adopted without examination, in order that it may never be examined.

He considered all he had said unnecessary, for there was no sentence to combat with; what was called a sentence was admitted to be, and so the court must take it, collusive and fraudulent in every view; and the defendant's counsel have contended that such a collusive sentence shall bind the court. To prove such sentence a nullity as to those who were not parties to it, he cited 44 *Edw.* 3. 45. b. 3 Co. 78. *Dier.* 339, applicable to the ecclesiastical court. *Gawen v. Roche*, 1 *Vesey*, 157. *Gloss.* 14. *Quest.* 12. *Lloyd v. Maddox.* *Moor*, 917.

He then-examined the arguments on this point used on the other side, and concluded with saying: The motion is not admissible. It is inconsistent with all order and method of trial to debate imaginary topics of defence before hearing the charge, and for the court to resolve abstract questions upon hypothetical grounds.

The *Solicitor General* argued on the same side, and to shew that such sentence was no bar to an indictment, he cited,

The *KING v. RICHARDSON and CARR*, *Old-Bailey September sessions*, 1765. The defendants were indicted for having forged a receipt for the payment of money with intent to defraud *A. B.* a seaman, intitled to wages. Upon the trial it appeared that the receipt was given in the name of *Jane Steward*, who was the supposed executrix of the will of *A. B.* which had been proved by the defendant *Carr* upon the oath of the other defendant *Richardson*. Baron *PERROT*, who tried the prisoner, was of opinion that the prisoners ought to be acquitted of the charge of forging a receipt for the money; but being satisfied from the evidence that *Richardson* had forged the will, notwithstanding it appeared in the trial before him that a probate had been granted to that will, he remanded *Richardson* to gaol to take his trial for the forgery of the will. *Richardson* was accordingly tried in *October sessions*,

Jefferson, 1765, for forging the will of *John Steward*, a mariner. The officer of the prerogative court proved upon that trial, that the will was brought to his office by *Richardson*, and a ~~proof~~ of that will granted, and upon that proof he was convicted and executed.

This and the case of *Sterling* refute that of the *King v. Vincent*. The only authority to support the argument that the sentence of an ecclesiastical court is a bar to an indictment. *Ante*

Mr. *Dunning*, to the same point, said it would be impertinent to be labouring to prove that when a subject is examined into, in the course of a criminal inquiry, under the form of an indictment or of an information, what has passed or may pass in the course of a civil inquiry on the same subject and the same question is ~~not~~ ^x regarded, but is ~~not~~ ^{not} admitted. In the instance that was put, and in many others it is perfectly notorious, and therefore neither requires argument nor proof that the practice is certainly so. Let a man be acquitted in a court of criminal jurisdiction it does not preclude a party, complaining of an injury arising from that act, which in a criminal court has been presented as a crime, from seeking redress for the civil injury; and *vice versa*, the fate of such an action can not be inquired into, much less can it preclude the proceedings in a subsequent criminal inquiry taking its rise from the same act. It has been inquired into in a court of one description, it is now inquiring into in a court of another description.

One reason, and there are many others, why courts of criminal jurisdiction do not admit any account of what has passed upon the agitation of the question in a court of civil jurisdiction, may be the liability to fraud and collusion; for it is obvious that if this would do, if the sentence of a court of such jurisdiction, whether ecclesiastical or temporal, will conclude a criminal inquiry, the receipt is of ample use, and all men may, if they please, cover themselves against the penal consequences of their crimes by instituting a friendly suit. Some such we have known to be so conducted as to escape the attention of the judges, who have not found out until after the cause

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has

* Here is a confusion of terms, which seems to be corrected by the second line of the next paragraph, & the last line but one of the first paragraph, p. 453.

has been decided that the cause has been collusive. Cases of this sort are so open to fraud and collusion, that for this reason if there were no other, the courts of criminal jurisdiction will always reject such evidence. He denied the *King v. Vincent* to be law; the supposition that it was so, if it ever existed, was removed by the different opinions held, upon the same point, by the judges who have succeeded in the same court, and to whose knowledge or ability no man could object. The *King v. Sterling*, he was aware might be attempted to be distinguished, by saying that the question did not occur, the objection was not taken in this or the other case, but knowing before whom those criminals were tried, no such objection could have escaped the judges, if it had been founded in law, although no counsel objected to it, or although the criminals perhaps had not the assistance of counsel; therefore that case may be considered fairly dismissed, and the subsequent cases carrying an authority against the defendant more than overturn it. But the *King v. Vincent* has no resemblance to the sentence now offered; it was an official instrument necessary to give sanction to a legal trial. Letters of administration or a probate may be admissible, but it does not follow that a sentence like this is admissible in this court: if it be, it must be equally admissible on all sides. It is argued that this court should receive it, should act upon it, should conclude upon it. Why? Because it is a sentence rescinding the marriage, declaring that there was no marriage, that is the import of this sentence; and therefore it operates in the defendant's favour, and therefore it happens that her counsel produced it. Let the case be inverted; let it be supposed that when this lady instituted that suit, the party who was the object of it, had supported that defence, as he was very well able to have done, and that in consequence the cause had ended in a declaration or a sentence that there was a marriage, in that case would it have been evidence on the part of the prosecutor? Would it have been attended with those consequences which are claiming for it now on the part of the person prosecuted? Would the House of Lords have endured that the prosecutor would have

have come here, to support this indictment by no other evidence than the production of a sentence in a suit like this in the spiritual court, by which that court had determined Mr. *Hensley* and the lady he had married were husband and wife? Every mind must revolt at the hardship and injustice of such an idea! And yet is there any thing more true than that a record cannot be evidence of one side, which if not, if it had imported the reverse, have been evidence, and with equal force with the other? It was one of the fundamental rules, to determine what evidence of this nature is or is not admissible, that if it could not have been admitted on behalf of the party objecting to it, supposing its import had been favourable to him, so neither shall it be admitted on behalf of the person proposing it. In order to support this indictment, something more than such a sentence will be required from the prosecutor; and it is clear that the legislature, in making this new provision, meant that the fact should be inquired into, as all other facts are inquired into; that the relation should be proved by those who were witnesses to it, by those who can prove the confession of the parties to it, or by those who can give such other evidence as courts of criminal jurisdiction are authorized to act upon. Can any thing then be more obviously unsuitable to justice, than that the inquiry should be precluded by a record in favour of one of the parties, which might have been as favourable to the other party, and which if it had been, would not have been regarded. He then answered the several other points previously agitated in the case.

Doctor *Harris* spoke, and ably on the same side.

Mr. *Wallis* replied to all the objections, and was followed by Doctor *Calvert*.

It was then ordered by the court that the following questions be put to the judges, viz.

First, Whether a sentence of the spiritual court against a marriage in a suit of jactitation of marriage is conclusive evidence so as to stop the counsel for the crown from proving the same marriage in an indictment for polygamy?

Second,

Second, Whether admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion.

The CHIEF JUSTICES of the COMMON PLEAS delivered the unanimous opinion of the judges with their reasons, and some observations on what passed in argument.

What has been said at the bar is certainly true, as a general principle, that a transaction between two parties in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal to a judgment he might think erroneous, and therefore the deposition of witnesses in another cause, in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon the fact found, although evidence against the parties, and all claiming under them, are not in general to be used to the prejudice of strangers. There are some exceptions to this general rule.

From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow, as generally true: *First*, that the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or as evidence conclusive between the same parties, upon the same matter directly in question in another court. *Secondly*, that the judgment of a court of exclusive jurisdiction directly upon the point, is, in the like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument by the judgment.

Upon the subject of marriage, the spiritual court has the sole and exclusive cognizance of questioning and deciding, directly, the question of marriage; and of enforcing specifically the rights and obligations respecting persons

persons depending upon it; but the temporal courts have the sole cognizance of examining and deciding upon all temporal rights of property; and so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the decision of the proper objects of their jurisdiction: they do not want or require the aid of the spiritual courts, nor has the law provided any legal means of sending to them for their opinion, except where, in the case of marriage, an issue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate consequence, "general bastardy;" or in like manner in some other particular instances, lying peculiarly in the knowledge of their courts, as profession, deprivation, and some others: in these cases, upon the issue so formed, the mode of trying the question is by reference to the ordinary; and his certificate when returned, received, and entered upon the record, in the temporal courts, is a perpetual and conclusive evidence against all the world upon that point, which exceptionable extent on whatever reasons founded, was the occasion of the statute of the 9 Hen. 6. requiring certain public proclamations to be made for persons interested to come in and be parties to the proceeding. But even in these cases, if the ordinary should return no certificate, or an insufficient one; or if the issue is accompanied with any special circumstances, as if a special issue, triable by a jury, is formed upon the same record; or if the effect of the same issue is put in another form, a jury is to decide, and not the ordinary to certify the truth; and to this purpose Sir *William Staunford* mentions a remarkable instance. Bigamy was triable by the bishop's certificate; but if the prisoner, to avoid the charge, pleads that the second espousals were null and void, because he had a former wife living, this special bigamy was not to be tried by the bishop's certificate.

So that the trial of marriage, either as to legality or fact, was not absolutely and from its nature an object *alieni fori*.

There

There was a time when the spiritual courts wished that their determinations might, in all cases, be received as authentic in the temporal courts, and in that solemn assembly of the king, the peers, the bishops, and judges, convened for the purpose of settling the demands of the church, by 'Edward the second, one of the claims was expressed in these words: "*Si aliqua causa, vel negotium, cujus cognitio spectat ad forum ecclesiasticum, et coram ecclesiastico iudice fuerit sententialiter terminatum, et transierit in rem judicatam, nec per appellationem fuerit suspensum; et post modum, coram iudice seculari super eadem re inter easdem personas questio moveatur et probetur per testes vel instrumenta, talis exceptio in foro seculari non admittatur.*" The answer to which demand was expressed in this manner: "*Quando eadem causa diversis rationibus coram iudicibus ecclesiasticis, et secularibus, ventilatur, dicunt quod (non obstante ecclesiastico iudicio) curia regis ipsum tractet negotium, ut sibi expedire videtur.*" For which lord Coke gives this reason, "For the spiritual judges proceedings are for the correction of the spiritual inward man, and *pro salute anime*, to enjoin him penance; and the judges of the common law proceed to give damages and recompence for the wrong and injury done," and then adds, "and so this article was deservedly rejected." 2 Inst. 22.

And the same demand was made, and received the same answer, in the third year of king James the first.

It is to be observed, that this demand related only to civil suits between the same parties; and that the sentence should be received as a plea in bar. But this attempt and miscarriage did not prevent the temporal courts from shewing the same respect to their proceedings as they did to those of other courts. And therefore, where in civil causes they found the question of marriage directly determined by the ecclesiastical courts, they received the sentence, though not as a plea, yet as a proof of the fact, it being an authority accredited in a judicial proceeding by a court of competent jurisdiction; but still they received it upon the same principles, and subject to the same rules by which they admit the acts of other courts.

Hence

Hence a sentence of nullity, and a sentence of affirmance of marriage, have been received as conclusive evidence on a question of legitimacy, arising incidentally upon a claim to a real estate.

A sentence in a cause of jactitation has been received upon a title in ejectment, as evidence against a marriage, and in like manner in personal actions, immediately founded on a supposed marriage.

So a direct sentence, in a suit upon a promise of marriage, against the contract, has been admitted as evidence against such contract, in an action brought upon the same promise for damages, it being a direct sentence of a competent court, disproving the ground of the action.

So a sentence of nullity is equally evidence in a personal action against a defence found upon a supposed coverture.

But in all these cases the parties to the suits, or at least the parties against whom the evidence was received, were parties to the sentence, and had acquiesced under it; or claimed under those who were parties, and had acquiesced.

But although the law stands thus with regard to *civil suits*, proceedings in matters of *crime*, and especially of *felony*, fall under a different consideration: *First*, because the parties are not the same; for the king, in whom the trust of prosecuting public offences is vested, and which is executed by his immediate orders, or in his name by some prosecutor, is no party to the proceedings in the ecclesiastical court, and cannot be admitted to defend, examine witnesses in any manner, intervene or appeal: *Secondly*, such doctrines would tend to give the spiritual courts, which are not permitted to exercise any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the decision from the common law, to which it solely and peculiarly belongs.

The ground of the judicial powers given to ecclesiastical courts, is merely of a spiritual consideration, *pro correctione morum, et pro salute animæ*. They are therefore addressed to the conscience of the party. But one great object of temporal jurisdiction is the public peace; and

crimes against the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was also so. A felony by statute becomes so at the moment of its institution. The temporal courts alone can expound the law, and judge of the crime; and its proofs; in doing so they must see with their own eyes, and try by their own rules, that is, by the common law of the land; and it is the trust and sworn duty of their office.

When the acts of *Henry* the eighth first declared what marriages should be lawful, and what incestuous, the temporal courts, though they had before no jurisdiction, and the acts did not by express words give them any upon the point, decided, incidentally, upon the construction, declared what marriages came within the *Levitical* degrees, and prohibited the spiritual courts from giving or proceeding upon any other construction.

Whilst an antient statute subsisted, by which personal punishment was incurred on holding heretical doctrines, the temporal courts took notice incidentally, whether the tenet was heretical or not, for "the king's courts" will examine all things ordained by statute." *Vide stat. 2 Hen. 4. ca. 15.*

When the statute of *William 3.* made certain blasphemous doctrines a temporal crime, the temporal courts alone could determine whether the doctrine complained of was blasphemous, so as to constitute the crime.

If a man should be indicted for taking a woman by force and marrying her; or for marrying a child without her father's consent; or for a rape, where the defence is "that the woman is his wife;" in all these cases the temporal courts are bound to try the prisoner by the rules and course of the common law, and incidentally to determine what is heretical, and what is blasphemous; and whether it was a marriage within the statute, a marriage without consent; and whether, in the last case, the woman was his wife: but if they should happen to find, that sentences in the respective cases, had been given in the spiritual court upon the heresy, the blasphemous doctrines, the marriage by force, the marriage without consent, and the marriage on the
rape;

rape; and the court must receive such sentences as conclusive evidence, in the first instance, without looking into the case, it would vest the substantial and effective decision, though not the cognizance of the crimes in the spiritual court, and leave to the jury and the temporal courts, nothing but a nominal form of proceeding upon what would amount to a predetermined conviction or acquittal, which must have the effect of a real prohibition, since it would be in vain to prefer an indictment, where an act of a foreign court shall at once seal up the lips of the witnesses, the jury, and the court, and put an entire stop to the proceedings.

And yet it is true, that the spiritual courts have no jurisdiction, directly or indirectly, in any matter not altogether spiritual; and it is equally true, that the temporal courts have the sole and entire cognizance of crimes, which are wholly and altogether temporal in their nature.

And if the rule of evidence must be, as it is often declared to be, reciprocal, and that in all cases, in which sentences favourable to the prisoner, are to be admitted as conclusive evidence for him; the sentences, if unfavourable to the prisoner, are, in like manner, conclusive evidence against him; in what situation must the prisoners be, whose life, or liberty, or property, or fame, rests on the judgments of courts, which have no jurisdiction over them in the predicament in which they stand? and in what situation are the judges of the common law, who must condemn, on the word of an ecclesiastical judge, without exercising any judgment of their own?

The spiritual court alone can deprive a clergyman. Felony is a good cause of deprivation. Yet in lord *Hobart's* reports it is held, that they cannot proceed to deprive for felony, before the felony has been tried at law; and, though after conviction they may act upon that, and make the conviction a ground of deprivation, neither side can prove or disprove any thing against the verdict; because, as that learned judge declares, "It would be to determine, though not capitally, upon a capital crime, and thereby judge of the nature of the crime, and the validity of the proofs; neither of which belong to them to do."

If therefore such a sentence, even upon a matter within their jurisdiction, and before a felony committed, should be conclusive evidence, a trial for a felony committed after, the opinion of a judge incompetent to the purpose, resulting (for aught appears) from incompetent proofs (as suppose the suppletory oath) will direct or rule a jury, and a court of competent jurisdiction, without confronting any witnesses, or hearing any proofs: for the question supposes and the truth is, that the temporal court does not, and cannot examine, whether the sentence is a just conclusion from the case, either in law or fact; and the difficulty will not be removed by presuming that every court determines rightly, because it must be presumed to, that the parties did right in bringing the full and true case before the court; and if they did, still the court will have determined rightly by the ecclesiastical laws and rules, and not by those laws and rules by which criminals are to stand or fall in this country.

If the reason for receiving such sentence is, because it is the judgment of a court competent to the inquiry then before them; from the same reason, the determination of two justices of the peace upon the fact or validity of a marriage, in adjudging a place of settlement, may hereafter be offered as evidence, and give the law to the highest court of criminal jurisdiction.

But if a direct sentence upon the identical question, in a matrimonial cause, should be admitted as evidence, (though such sentence against the marriage has not the force of a final decision, that there was none) yet a cause of jactitation is of a different nature; it is ranked as a cause of defamation only, and not as a matrimonial cause, unless where the defendant pleads a marriage; and whether it continues a matrimonial cause throughout, as some say, or ceases to be so on failure of proving a marriage, as others have said, still the sentence has only a negative and qualified effect, *viz.* "that the party has failed in his proof, and that the libellant is free from all matrimonial contract, *as far as yet appears*;" leaving it open to new proofs of the same marriage in the same cause.

cause, or to any proofs of that or any other marriage in another cause : and if such sentence is no plea to a new suit there, and does not conclude the court which pronounces, it cannot conclude a court which receives the sentence, from going into new proofs to make out that or any other marriage.

So that admitting the sentence in its full extent and import, it only proves that it did not yet appear that they were married ; and not that they were not married at all : and by the rule laid down by lord chief justice *Holt*, such sentence can be no proof of any thing to be inferred by argument from it ; and therefore it is not to be inferred, that there was no marriage at any time and place. That sentence and this judgment may stand well together, and both propositions be equally true : it may be true that the spiritual court had not then sufficient proof of the marriage specified, and that your lordships may now, unfortunately find sufficient proof of some marriage.

But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not be impeached from within ; yet like all other acts of the highest judicial authority, it is impeachable from without : although it is not permitted to shew that the court was *mistaken*, it may be shewn that they were *mised*.

Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. Lord *Coke* says it avoids all judicial acts, ecclesiastical or temporal.

In *civil suits* all strangers may falsify, for coven, either fines or real or feigned recoveries, and even a recovery by a just title, if collusion was practised to prevent a fair defence ; and this whether the coven is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default, or extrinsic, as not pleading a release, collateral warranty, or other advantageous pleas.

In *criminal proceedings*, if an offender is convicted of felony, on confession ; or is outlawed, not only the time of the felony, but the felony may be traversed by a purchaser,

purchaser, whose conveyance would be affected as it stands; and, even after a conviction by verdict he may traverse the time *.

In the proceedings of the ecclesiastical court the same rule holds. In *Dyer* there is an instance of a second administration, fraudulently obtained, to defeat an execution at law against the first; and the fact being admitted by demurrer, the court pronounced against the fraudulent administration. In another instance an administration had been fraudulently revoked; and the fact being denied, issue was joined upon it, and the collusion being found by a jury, the court gave judgment against it.

In the more modern cases, the question seems to have been, whether the *parties* should be permitted to prove collusion; and not seeming to doubt but that strangers might.

So that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a jury and determined by the courts of temporal jurisdiction.

And if fraud will vitiate the judicial acts of the temporal courts, there seems as much reason to prevent the mischiefs arising from collusion in the ecclesiastical courts, which from the proceedings, are at least as much exposed, and which we find have been, in fact, as much exposed to be practised upon for sinister purposes, as the courts in *Westminster-hall*.

We are therefore unanimously of opinion—

First, That a sentence in a spiritual court against a marriage in a suit of jactitation of marriage is not conclusive evidence, so as to stop the counsel for the crown

* So an accessary indicted, after the conviction of the principal, for the felony of receiving stolen goods, may controvert the guilt of the principal notwithstanding the record of his conviction; and if it appear that the goods were taken under circumstances that do not amount to larceny, the accessary shall be acquitted †. *Smith's case*, *Leach. Cr. Law.* 2 edit. 237. 3 edit. 323.

† *M^r Daniel's case*, *Fost. Cr. L.* 121. 365. Post 463.

from proving the marriage in an indictment for polygamy. But,

Secondly, Admitting such sentence to be conclusive upon such indictment, the counsel for the crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion. 11 *St. Tr.* 201. 205 to 237. 261, 262.

In *STEDMAN v. GOOCH*. *Nisi Prius, Easter, 33 Geo. 3. Erskine*, for the plaintiff, in support of the issue on the second plea, which was coverture, stated that the evidence he had to that effect was first a sentence of the ecclesiastical court, by which the defendant and her husband were separated; secondly, separate maintenance. To prove the separation, he produced and proved the sentence of the spiritual court, by which a divorce *a mensa et thoro* was pronounced between the parties.

Mingay objected that the production of the sentence alone was not sufficient evidence, that the libel and all the proceedings in that court should likewise have been produced in court.

Lord KENYON, C. J. seemed disposed to be of opinion that the sentence alone was sufficient; but he reserved the point, and in the ensuing term the question was agitated, and the other judge seemed to concur with the chief justice—but no judgment has been given. *Esplin. Rep.* 6. 8.

NOTE.—In the *Dutcheffs of Kingston's case*, all the proceedings were read before the lords.

Rule the Fourth.

A record of conviction of treason, felony, or any other crime infamous in its nature, is a conclusive exception and bar to the competency of the person so convicted when offered as a witness. 2 *Hawk. P. C. ca.* 46. Vide *ca.* 18. *ante* 206. On the competency of persons attainted; and *ca.* 19. *ante* 313, on their restoration to competency.

Rule the Fifth.

If the principal and accessory are joined in one indictment and tried together, the accessory may enter into the

the full defence of the principal; avail himself of every matter of fact and every point of law tending to his acquittal. *Fost. Cr. La.* 365. Vide 2 & 3 *Edw.* 6. ca. 24. *Ante* 462.

For the accessory is in this case to be considered as *particeps in lite*, and this sort of defence necessarily and directly tendeth to his own acquittal.

Rule the Sixth.

The conviction of the principal is evidence against the accessory sufficient to put him upon his defence; but it is not conclusive evidence against him.

This rule is founded on the opinion of *Foster*, who says, when the accessory is brought to his trial after the conviction of the principal, it is not necessary to enter into a detail of the evidence, on which the conviction was founded. Nor doth the indictment aver, that the principal was in fact guilty. It is sufficient if it reciteth with proper certainty the record of the conviction. This is evidence against the accessory sufficient to put him upon his defence. For it is founded, on a legal presumption, that every thing in the former proceeding was rightly and properly transacted. But a presumption of this kind must give way to fact manifestly and clearly proved. As against the accessory, the conviction of the principal will not be conclusive; it is as to him *rei inter alios acta*. *Foster's Cr. Law.* 365. res

Rule the Seventh.

And therefore if it shall come out in evidence, upon the trial of the accessory, as it sometimes hath and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or not to that species of felony with which he was charged, the accessory shall avail himself of this and ought to be acquitted. *Fost. Cr. Law*, 365. 9 Co. 118. *Lord Sanchar's case*.

As in the *KING v. M'DANIEL, and others, Old-Bailey sessions, December, 1755*. Certain youths who were convicted of

of robbery being totally ignorant of the conspiracy, mentioned in the report of that case, took no advantage of it, and were convicted upon full legal evidence. But when the whole scene of villainy came to be disclosed upon the trial of those miscreants, they were discharged from that indictment upon this single objection—that the offence of the principals did not, in the eye of the law, amount to robbery. *Fost. Cr. Law* 365.

FOSTER then puts this case in illustration. *A.* is indicted for stealing a quantity of live fish, the property of *B.* *A.* pleadeth guilty upon his arraignment, is immediately burnt in the hand and discharged. At the next sessions *C.* is indicted as an accessory to *A.* in this felony after the fact, as the receiver, knowingly. *A.* is produced as a witness against him, and in the course of his evidence proveth, that the fish were taken in a river, of which *B.* had the sole and several fishery, or in a large pond upon the waste of *B.* Might not *C.* had he been so advised have insisted that the fish being at their natural liberty, *B.* had no fixed property in them, and consequently that the taking of them in *that state*, could amount to no more than a bare trespass. Undoubtedly he might. *Fost. Cr. Law*, 336.

This rule is further illustrated in the *KING v. SMITH, Old-Bailey, December sessions, 1783.* The prisoner was indicted on the statutes 3 *Will. & Mary*, ca. 9. sec. 4. and 5 *Anne*, ca. 3. sec. 5. *Irish*, as an accessory after the fact in receiving a quantity of flour, the property of *John Peacocke*, knowing to be stolen.

It appeared that two persons of the names of *Gilbertson* and *Wareham*, who were servants to the prosecutor at the time that the felony was committed, had made a full and free confession of the fact of taking the flour from their master, and that *Wareham* had been convicted as a principal felon on the evidence of *Gilbertson*, who had been admitted an evidence for the crown.

The record of *Wareham's* evidence was produced, but on the authority of *M. Daniel's* case above cited, the court permitted the prisoner's counsel to controvert the propriety of that conviction by *viva voce* evidence; and it in fact appeared that the prosecutor had intrusted

Wareham with the flour in such a way as to make the conversion of it a *breach of trust* only, and not a felony. The prisoner was accordingly acquitted. *Leach's Cr. Cases*, 3 edit 324.

In *February sessions*, 1784, at the *Old-Bailey*, *Philip Proffor* was indicted as an accessory before the fact in procuring one *Rothewell* to counterfeit a halfpenny. The record of *Rothewell's* conviction was produced, and it was admitted by *GOULD, J.* upon the authority of *Foster*, that the record of the conviction of the principal was not conclusive evidence of the felony against the accessory, and that he has a right to controvert the propriety of such conviction, for a record is only conclusive evidence against those who are parties to it. *Leach. Cr. Ca.* 3 ed, 324. Vide the *dutchess of Kingston's case*. Ante 454.

Rule the Eighth.

So the principal or accessory can avail himself in point of fact as well as in point of law, by shewing against the evidence of the record by the testimony of witnesses that the principal was totally innocent.

Foster considers that this rule should be received with great caution; because facts for the most part depend upon the credit of witnesses, and when the strength and hinge of a cause happeneth to be disclosed, as it may be by one trial, witnesses for bad purposes may be easily procured. *Fost.* 366.

He then states, which is in favour of the rule, a resolution of the judges in lord *Sanchar's* case, *Trinity*, 10 Jac. 1. The principal is outlawed, and thereupon the accessory is tried, convicted, and executed. The principal afterwards cometh in, reverseth the outlawry, and pleadeth over to the felony, and upon his trial (of course upon evidence of facts controverting the record) is acquitted. This, saith *Coke*, reverseth the attainder of the accessory. 9 Co. 119. *Fost.* 367.

It hath been premised, that in order to convict the accessory it is not necessary to enter into the detail of the evidence upon which the principal was convicted: but still, if it shall manifestly appear in the course of the
accessary's

accessary's trial that in point of *fact* the principal was innocent; common justice seemeth to require that the accessary should be acquitted. *Foss. 367.*

A. is convicted upon circumstantial evidence, strong as that sort of evidence can be, of the murder of *B.* *C.* is afterwards indicted as accessary to this murder, and it cometh out upon the trial, by incontestible evidence, that *B.* is still living. Is *C.* to be convicted or acquitted? The case is too plain to admit of a doubt. *Id.*

NOTE.—Lord HALE mentions a case of this kind; and not many years ago, a man was arraigned at the commission of *Oyer and Terminer, Dublin*, for the murder of his wife, who to the astonishment of the court, and infinite satisfaction of the prisoner at the bar, from whom she had eloped, made her appearance. *MS.*

Or suppose *B.* to have been in fact murdered, and that it should come out in evidence, to the satisfaction of the court and jury, that the witnesses against *A.* were mistaken in his person. A case of this kind I have known, that *A.* was not, nor could possibly have been, at the murder. *Foss. 367.*

More *alibi* evidence, it must be admitted, lieth under a great and general prejudice, and ought to be heard with uncommon caution. But if it appeareth to be founded in truth, it is the best negative evidence that can be offered; it is really positive evidence, which in the nature of things necessarily implieth a negative. And in many cases it is the only evidence an innocent man can offer. What, in the case I have put, are a court and jury to do? If they are satisfied upon the evidence that *A.* was innocent, natural justice and common sense will suggest what is to be done in the case of *C.* *Foss. 368.*

If these cases prove that in any case whatsoever the legal presumption against the accessary, founded on the conviction of the principal, may be repelled by contrary evidence, they prove as much as can be expected from them. THE RULE IS RIGHT, the difficulty will lie in the application of it to particular cases. How far it is to be carried to cases probably not equally strong, must,

all circumstances duly weighed and considered, be left to the prudence, circumspection, and abilities of the learned judges before whom the several cases may happen to come in judgment. *Ibid.*

Rule the Ninth.

On an indictment for perjury, the *poslea* of a former issue is good evidence that there was a trial.

As in *PILTON v. WALTER*, *Surrey Assizes*, 5 Geo. 3. by PRATT, C. J. who ruled, that the bare producing the *poslea* is no evidence of the verdict, without shewing a copy of the final judgment: because it may happen the judgment was arrested, or a new trial granted. But it is good evidence, that a trial was had between the same parties; so as to introduce an account of what a witness swore at that trial, who is since dead. 1 *Str.* 162.

And in the *KING v. ISLES*, *Nisi Prius*, *London*, *Mich.* 14 Geo. 2. before lord RAYMOND, C. J. On an indictment for perjury in what the defendant swore on a trial as a witness, the *poslea* was ruled to be good evidence to shew there was a trial so as to introduce the evidence given, on which the perjury was assigned. *Barnard. K. B.* 243. So,

In the *KING v. MIMMS*, *Nisi Pri.* *Westminster*, 32 Geo. 3. the same point was ruled, *Esplin*, *N. P.* 750.

Rule the Tenth.

An office copy of an answer to a bill in equity may be given in evidence in a civil suit; but not on an indictment for perjury; though perhaps such copy would be sufficient for the grand jury to find the bill: but on the trial the original must be produced and positive proof made that the defendant was sworn by a witness acquainted with him. *Bull. N. P.* 239.

And no return of commissioners of a master in chancery, or of the party's swearing, will be sufficient, without some proof of the party's identity. *Ibid.*

So in the *KING v. ———*, *Mich.* 2 Jac. 2. at bar. An information was exhibited against the defendant for perjury;

jury; setting forth, that a bill in chancery was exhibited by one *A. B.* and the proceedings thereon.

The perjury was assigned in a deposition made by the defendant, thirtieth of July, 1683, and taken in that cause, before *commissioners in the country*.

This cause was tried at bar, and the question was, whether the return of the commissioners, that the defendant made oath before them, shall be sufficient evidence to convict him of perjury, without their being present in court to prove him the very same person.

Pemberton, serjeant, for the defendant, insisted that the commissioners must be in court, or some other person, to prove that he was the person who made the oath before. *He* argued that, the commissioners sign the depositions, and they ought to produce them so signed to the court and prove it; for depositions are often suppressed by the court.

If a true copy of an *affidavit* made before the chief justice of this court be produced at a trial, it is not sufficient to convict a man of perjury. This is not like the case of perjury assigned in an answer in *chancery* taken in the country, for that is under the party's hand; but here nothing is under the defendant's hand; and therefore the commissioners ought to be in the court, to prove him to be the man.

The court were equally divided: the CHIEF JUSTICE and WIGHTHAM, J. were of opinion, that it was not evidence to convict the defendant of perjury; it might have been otherwise upon the return of a master of *chancery*, for he is upon his oath, and is therefore presumed to make a good return; but commissioners are not upon oath, they pen the depositions according to the best of their skill, and a man may call himself by another name before them without any offence.

The commissioners can not be mistaken in the oath, though they may not know the person; for this court may be so mistaken in those who make *affidavits* here, but not in the oath; if the commissioner, or the clerk to the commissioner had been here, they would have been good evidence.

If an *affidavit* be made before a justice of the peace, of a robbery, as enjoined by the statute; if you will convict the

the person of perjury, you must prove the swearing of the affidavit. 3 *Mod.* 117.

Rule the Eleventh.

But proof, that a person calling himself *John Doe* was sworn, and that he signed the answer in equity, or the affidavit on which the perjury is assigned; and proof by another witness of the hand writing, is sufficient to intitle the crown to read, as evidence, the answer or affidavit. *Bull. N. P.* 239.

Rule the Twelfth.

So an answer being brought out of the proper office, and the jurat under the master's hand, and proof of it being signed by the defendant, by proof of his hand writing, is sufficient to prove it sworn by him, even on an indictment of perjury. *Bull. N. P.* 239.

This rule is illustrated in a note to the KING, *v.* NUNEZ, 9 *Geo.* 2. where it is said, N. B. In *Scaccario*. The defendant signs his answer, for the proof here to read it, was only the hand writing of the baron and of the defendant. 2 *Str.* 1043. *Theory of Evid.* 192.

And in the KING, *v.* JOHN MORRIS, *Nisi Prius*, after *Easter term*, 1 *Geo.* 3. 1761. The defendant was convicted of wilful and corrupt perjury, in an answer in chancery.

Lord MANSFIELD, who tried him, made his report. He stated an objection to the evidence which had been made by the defendant's counsel at the trial, *viz.* "that there was no proof of the identity of the person who swore the answer; nor even proof that any person at all swore it." This objection, he said, he had overruled at the trial, thinking it sufficient that the hand of the defendant and of the master were proved. But he desired to have the opinion of his brethren on this point, that the defendant might have the benefit of the objection, if it should seem to them to have any force in it, though he declared himself to be still clear in his former opinion.

DENISON

DENISON and WILMOT, J's. (FOSTER absent) concurred with his lordship, and they were all clearly and unanimously of opinion, that as the name subscribed to the answer was proved to be the defendant's hand writing, and the master had proved that the *jurat* was subscribed by him the master, as being sworn before him; this was sufficient proof "that he was the same person," and also, "that he actually swore it;" for the very reason why the court of chancery, some time since, made a general order, "that all defendants should sign their answers," was with the "very view to the more easy proof of perjuries "in answers." And as to the actual swearing, it is in the nature and course of business, quite necessary to take the *jurat*, attested by the proper person before whom the oath ought to be taken, as sufficient proof of it's being actually sworn by the person, so far at least, as to put it upon him to shew, or to raise a reasonable suspicion, "that he was personated," as it would otherwise be almost impossible to convict any one of perjury committed in an answer on chancery. 2 Burr. 1189. *Leach's Cr. Ca.* 2 edit. 48. 3 edit. 60. Vide 1 *Show.* 397.

So in the KING, v. HARE, *commission of oyer and terminer*, Dublin, February, 1795.

Indictment for perjury, before CHAMBERLAIN, J. It was ruled, on an objection made by defendant's counsel, that the *Baron* before whom the answer, on which the perjury assigned had been sworn, need not be produced as a witness to prove the swearing of the answer before him, and that evidence of his hand writing, and the hand writing of the party on trial, subscribed to the answer in the usual way, was sufficient to authorize the reading of the answer. And CHAMBERLAIN, J. said, he had consulted the judges, ten of whom (KELLY and METGE absent) were unanimous for admitting the evidence.

The KING, v. THOMAS BRADY, *Old-Baili*, July sessions, 1784, seems an exception to the last rule, but perhaps may be rather considered as independent of it. The prisoner was tried before ADAIR, Recorder of London, on the *stat.* 31 Geo. 2. ca. 10. sect. 24. The indictment charged, "That he, *Thomas Brady*, well know-
" ing

“ing that one *Michael Power*, deceased, had served our
 “lord the king on board the *Pallas*, and that certain
 “wages and pay were due to him for such service, came
 “on the 18th of *November*, 1783, before the worship-
 “ful *James Harris*, then surrogate to the right wor-
 “shipful *Peter Calvert*, Esq; LL. D. and unlawfully,
 “knowingly, and feloniously, did take a false oath, that
 “the said *Michael Power* was dead, without making
 “any will, and that he, the said *Thomas Brady*, was his
 “brother and next of kin, whereas in truth and in fact,
 “the said *Thomas Brady* was not the brother of the said
 “*Michael Power*; with intent to obtain letters of adm-
 “nistration, in order to receive the said wages and pay,
 “due and owing to the said *Michael Power*, on account
 “of his said service.” There was a second count,
 charging, “That he supposing wages due, &c.”

The evidence was, that the prisoner, accompanied by another seaman, in *November* 1783, went to Mr. *Mackintosh*, a navy agent, and told him that he had a brother who died on board the *Pallas*, and wanted to administer to him, for the purpose of receiving his wages; that his name was *Thomas Power*, and that he had neither father, mother, brother, nor sister, living; that *Mackintosh* introduced him to *Shepherd*, and that he witnessed the warrant in the registry of the prerogative court of *Canterbury*, by which warrant it appeared that a man calling himself *Thomas Power* had taken the usual oath, to wit, “That *Michael Power* died a bachelor, intestate, without parent, and that he was the natural and lawful brother of the deceased.” That this warrant was signed by the name *Thomas Power*, and that the jurat was attested by doctor *Harris*, but who the man was that had so taken this oath, or whether the signature was the hand writing of the prisoner, the witness *Shepherd* could not swear. It also appeared, that a man who called himself *Thomas Power*, had signed the bond; that the bond was witnessed by *Mackintosh* and one *Thomas Cruso*, but that *Mackintosh* could not tell who the person was who had signed it, and *Thomas Cruso* could not be found. It also appeared, that the prisoner had applied on the 15th of *January* to *Charles Pinkston*, a clerk to one
Harper,

Harper, a navy agent, in the name of *Thomas Brady*, with a certificate signed by the purser of the ship *Pallas*, and an order to receive some prize-money; that while he was thus waiting in *Harper's* office, *Mackintosh*, the person by whose means he procured letters of administration to *Michael Power* went in, and finding that he was using a different name, suspected him, and procured him to be apprehended. On inquiry, it turned out, that his real name was *Thomas Brady*, that he had been an able seaman on board the *Pallas*; and that there was another, able seaman on board the same ship, of the name of *Michael Power*, but that he had no brother.

THE COURT. The statute on which this indictment is founded, enacts, "That whosoever willingly and knowingly takes a *false oath*, to obtain the probate of any will or wills, or to obtain letters of administration, in order to receive the payment of any wages, pay, or other allowances of money, or prize-money due, or that were supposed to be due, to any officer, seaman, or other person who has really served on board any ship or vessel in the king's service, shall be guilty of felony, without benefit of clergy."

At common law, perjury is a *misdemeanor* only; but, by this statute, this particular species of perjury is converted into a particular felony; but it is still incumbent on the prosecutor to fit the evidence to the particular fact, and to prove every circumstance which is necessary, to bring it within the range of the law, not only by clear, precise, and exact evidence, but by the *best evidence* that is possible to be produced.

Now, on the present indictment, the jet of the crime is the taking the *false oath*, and there is no instance where an indictment for *perjury* has been supported, without direct and positive proof, that the party took the oath on which the perjury is assigned; or where the evidence of that fact has been attempted to be supplied by inference of the other circumstances of the case.

In the present case, there is certainly no express, direct evidence, that the prisoner took the oath in question, but circumstantial evidence only.

The fact of a prisoner's having taken the oath, requires as distinct a proof as the fact does, of his having executed the bond: but Mr. *Shepherd's* memory will not serve him as to the person who took the oath; and doctor *Harri* not being here, there is no direct proof of it. The evidence therefore is defective; for there certainly is a possibility, from any thing that has been given in evidence to the contrary, that the prisoner might have gone through all the rest of the fraud, and have avoided the circumstance of having taken the oath; especially as he probably knew that the taking of the oath was a capital felony. If this were an indictment for perjury at common law, it would have been incumbent on the prosecutor to give precise and positive proof, that the prisoner was the person who took the oath; and it is equally incumbent on him so to do on the present occasion; for the part where the proof is defective, is the very point on which his guilt or innocence turns.

The counsel for the crown, requested the case might be saved for the opinion of the judges, on a question, whether on an indictment on this statute, it was necessary to have direct proof of the prisoner having taken the oath, or whether that fact might not be inferred by the jury, from the other circumstances of the case.

The court told the jury, that if, notwithstanding the above observations, they were satisfied that the prisoner actually took the oath, they might find him guilty; but that as the fact was not clearly proved, they ought to acquit him—which they did. *Leach. Cr. Ca. 3 edit. 368.*

Rule the Thirteenth.

Written evidence, as well as parol, may be explained by the party swearing: wherefore, if a defendant in a court of equity, by a second answer, explains what he has sworn to in a first answer, nothing can be assigned in an indictment for perjury, of course nothing can be proved on the trial of that indictment that was so explained.

As in an information for perjury, and the perjury assigned was in the defendant's answer, "That he received

"received no money;" and on exceptions taken for insufficiency, the defendant says, in a second answer, "That he received no money until such a day;" and on the trial of the information it was held, that nothing should be assigned for perjury that was explained in the second answer: for the first answer shall be charitably expounded, according to what appears to be the parties sense in the second answer: for the court would rather intend there was some oversight in the draft, and that it was afterwards amended in the second answer, than suppose the party to be guilty of wilful and corrupt perjury. 1 *Siderf.* 418, 19. 2 *Keb.* 516.

NOTE. It must be taken of course, that the day was material to the cause, so that non-receipt until after such a day, would come within the sense as to the matter before the court of *non-receiver* generally. *Loft in Gilb. Ev.* 55. Vide *Henry, v. Watson, Ant.*

CHAPTER IV.

Of Written Evidence inferior to matter of Record.

Rule,

THE books of public offices, and of public bodies, which of course are not interested in the event of the trial, are admissible evidence.

As in the *KING, v. DOMINICK FITZGERALD*, and *JAMES LEE*, *Old-Bailey session*, 1741. Indicted for forging a paper, purporting to be the last will and testament of *Peter Perry*, late a seaman on board his majesty's ship *Lancaster*, with intent to defraud the king.

It was proved by the *muster-book*, transmitted by the officers of the ship to the navy-office, that *Peter Perry* belonged to the ship *Lancaster*, that at the time of his decease there were 42*l.* 6*s.* due to him; and that a ticket for the payment of the same was made out, and delivered to a person who brought the probate of the will in question.

The COURT, the prisoner being found guilty, reserved this question for the judges—Whether the *muster-book* was admissible evidence? but though they met on the question, their opinion was never published, and the defendant was hanged. However it appears in the next case. *Leach, Cr. Ca. 2 edit. 20. 3 Edit. 24. 29.*

The KING, v. ROBERT RHODES, *April sess. Old-Bailey, 1742.* Indicted as in the last cited case, for forging the last will of *John Thompson*, late of his majesty's ship the *Flamborough*.

It appeared by the evidence of the clerk of the ticket-office, in the navy-office, that it was customary for the captains of men of war to transmit accounts of their crews to the navy-office, as frequently as possible, and that these accounts are entered regularly in muster-books, containing the names of all those who are living, dead, or have run away. The *muster-book* belonging to the *Flamborough* was produced, in which there was this entry: "*John Thompson*, an able seaman, died 22 *August*, 1739, at Turtle-bay, on board the *Flamborough*."

The prisoner's counsel contended, that as the prisoner was charged with forging the will of *Thompson*, it was incumbent on the prosecutor to prove, by the best evidence the nature of the fact would admit of, that the testator was dead, and that the best evidence of that fact was, by some one of the many persons who were on board the ship, and not by the accounts of the captain or other officers, who might by accident or design, return the man dead when he was really alive.

The counsel for the crown, answered, that the objection was incongruous on the part of the prisoner, for that he had actually proved the will in Doctor's Commons, and received the wages at the navy-office, by virtue of the probate, which implied an acknowledgment by him, that *Thompson* was dead; but that exclusive of that reason, it was the constant course and uninterrupted practice of the court to admit the entry of the muster-book, after it had been authenticated by the clerk who signed it. The COURT over-ruled the objection, and cited the last case. *Leach's Cr. Ca. 2 Edit. 23. 3 Edit. 29. Vide Sterling's case. Ante 429.*

So in the case of RICHARD RAMSBOTTOM, *Old-Bailey, September sessions, 1787*, indicted for forging a seaman's will. To prove the probate revoked, *Thomas Fletcher*, a clerk in the prerogative court, produced an entry of the revocation in a book called, *The Affignation Book*, in which all causes are entered by the register, and which was kept officially by the witness, as the only record of such proceedings, and of the decrees of the court. It was objected that this book was not admissible evidence.

The COURT were clearly of opinion, that it was evidence to prove the fact of the probate being revoked. *Leach. Cr. Ca. 3 Edit. 30.*

In the KING, *v. AICKLES, Old-Bailey, September sess. 1785.* *Aickles* was sentenced to be transported for seven years. On an indictment for returning from transportation, and being found at large without any lawful cause, before the expiration of that term, it was held incumbent on the prosecutor to prove the precise day on which the prisoner was discharged from Newgate.

The clerk of the papers of the prison, produced a *daily-book*, which he kept, containing entries of the names of all the debtors and persons who are brought into prison on warrants for crimes, and when they are discharged. But these entries were not made from the clerks own knowledge of the facts, but that he generally made them from the information of the turnkeys, and frequently from the turnkeys indorsements on the back of the warrants, which warrants were afterwards regularly filed.

It was contended by the prisoner's counsel, that these were not *original* entries of the facts; and that therefore the turnkey himself, by whom *Aickles* was discharged, or the original minute from which the entry of his discharge had been made, should be produced, because they alone were the best evidence upon this subject, and it was in the prosecutor's power to produce it. They compared the evidence offered, to the production of a merchant's ledger, in order to prove the delivery of goods, instead of producing the original day-

day-book, from which the ledger had been posted, and they argued, that no credit could be given to entries made intirely from hearlay and information, and therefore these entries ought not to be received in evidence.

GOULD, J. HATHAM, B. and ADAIR, Recorder, however determined that the entry in this book might be given in evidence. It is a book very different in its nature from the books or memorandums of tradesmen. It appears to have been the constant and long established practice of the keepers of a public prison to register the discharge of prisoners in such a book as the one produced, and in the manner which the witness hath described. The clerk of the papers is a public officer in the prison, and the law reposes such a confidence in public officers, that it *presumes* they will discharge their several trusts with accuracy and fidelity, and therefore whatever act they do, in discharge of their public duty, may be given in evidence, and shall be taken to be true, under such a degree of caution as the nature of the circumstances of each case may appear to require, except the *falsity* of them may be made to appear, for every *presumption* may be repelled by contrary evidence. In the present case the clerk of the papers has no private interest whatsoever in this book to induce him to make fictitious entries in it. He is a public officer recording a public transaction. Any person may undoubtedly falsify the entries, if he can; but unless the truth of the entry, as to the present fact can be impeached, it is admissible evidence. *Leach, Cr. Cq. 2. edit. 303. 3 edit. 437.*

In the case of the KING v. MOTHERSELL, *Easter, 4 Geo. 1.* Motion for a new trial. On an information in nature of a *quo warranto*, the prosecutor produced in evidence a book which appeared to be only minutes of some corporate acts of the year past, all written by the prosecutor's clerk, who was no officer of the corporation. The admissibility of this evidence was opposed, the book having never been kept, nor considered as one of the corporation's books in which entries were made by the town-clerk, and there being some suspicion that the book was not genuine. The JUDGE required an

an account of where the book had been kept for the preceding ten years, and whether any body had seen it before, which the prosecutor not being able to give he rejected the evidence offered.

Et per CURIAM corporation books are generally allowed to be given in evidence, when they have been publicly kept as such, and the entries made by the proper officer; not but entries made by other persons may be good, if the town-clerk be sick or refuses to attend, but then, that must be made appear by evidence. Whoever produces a book, must establish it before he delivers it. Parties producing deeds must give an account where they have been kept, and how they were come by. Therefore we are of opinion, this evidence thus offered was well over-ruled, and consequently a new trial was refused. 1 *Strange*, 93.

So in *PITTON v. WALTER*, *Surrey assizes*, 3 *Geo. 1.* The question being whether the lessor of the plaintiff was heir at law to him who last died seised. To prove the pedigree, the chief justice admitted a visitation in 1623, made by the heralds, entered in their books and kept in their office, to be read in evidence. He also admitted the minute book of a former visitation, signed by the heads of several families, which was found in the library of lord *Onford*. 1 *Str.* 162. *Barnard, K. B.* 243.

It hath been decided in *DANIEL HÖET's* case, convicted on two informations for libels that a *gazette* is evidence of all acts of state.

And therefore a *gazette* in which it was stated that certain addresses had been presented to the king from different bodies of subjects expressing their loyalty, &c. was admitted in evidence to prove an averment in an information for a libel, "that divers addresses had been presented to his majesty by divers of his loving subjects," &c. 5 *Term. Rep.* 436.

CHAPTER V.

*Of the Operation of the Stamp-Acts relative to Evidence.**Rule the First.*

EVERY written, engrossed, or printed paper, velum, or instrument which are required by act of parliament to be stamped, are inadmissible in evidence unless they are stamped. *Stat. 33 Geo. 3. ca. 49. sect. 14. and 23 Geo. 3. ca. 58. sect. 11. Same prohibitions in the Irish Stamp-acts.*

Rule the Second.

But, the above prohibitory rule is restricted to civil suits, for, on indictments for forging a bill of exchange, promissory note, or any other security for money or other writing liable to a stamp duty, the forged paper, or instrument, may be given in evidence, although it is *not* stamped, pursuant to the statutes.

As in the *KING v. HAWKSWOOD, Worcester Lent assizes, 1783*. The prisoner was indicted for forging a negotiable bill of exchange, purporting to be drawn by a person named *Prattington*, on *Sir Robert Herries*, and Co. and also for forging two indorsements on the same, the one in the firm of *Cox & Davey*, and the other in the name of *James Hayden*. There were also the usual counts for uttering it, knowing it to be forged.

The fact of its being a forgery, and that the prisoner had negotiated it with a complete knowledge of that fact were clearly proved, but upon producing the bill in evidence, it appeared *not* to be stamped pursuant to the statutes, which enact, "that no bill of exchange, &c. "not stamped as those acts direct, shall be pleaded or "given in evidence in *any* court, or admitted in *any* "court to be good or available in law or equity."

Baldwin, for the prisoner, submitted, that the instrument in question, even supposing it to be genuine, was
not

not a lawful bill of exchange, but a piece of waste paper, incapable of becoming the subject of either fraud or felony; that the party who took it must at the time have known that it was not a legal bill of exchange, or must be grossly negligent, for the defect was visible on the face of it.

BULLER, J. held, that the stamp acts, being revenue laws, and not purporting to alter the crime of forgery, could not affect the present question, and the jury found the prisoner guilty: but the point being new he respited the judgment, and reserved the case for the consideration of the judges.

In *Easter term*, 1783, the judges over-ruled the objection, and determined the conviction was right. *Leach's Cr. Ca.* 2 edit. 221. 3 edit. 293.

So in the *KING, v. JOHN LEE*, *Old-Bailey*, *January sessions*, 1784.

The prisoner was indicted for forging a bill of exchange, purporting to be made by lord *Townshend*, master of the ordnance, and to be drawn on the ordnance office, *Whitehall*, where no such office was held.

Mac Nally, for the prisoner, objected to the reading of this paper, on the ground that it was not stamped pursuant to the statute, and therefore was to be admitted in evidence. It was not, he said, a bill of exchange, for it wanted a component part, made necessary to its perfection, and ordered to be annexed to it by statute; without the annexation of the stamp, required by law, it was not negotiable. A bill of exchange was such an instrument as should have certain qualities to render it current to all the world. A stamp, since the statute, was indispensable, to constitute the credit and currency of bills of exchange and promissory notes; they were representatives of money, and to support that character visibly, required a stamp, as much as gold or silver required the usual mint impression, without which those metals could not pass as coin. If offered on Change, in such a deficient state, it would be rejected and dishonoured, as peremptorily as if it wanted the name of a drawer, or the signature of an acceptor, which were

constituent parties to a bill of exchange. It is an instrument of no value in its present state, intrinsic or extrinsic, and by the act of parliament it was prohibited from being "pleaded or given in evidence in any court, or admitted to be good or available in law or equity."

The COURT over-ruled the objection, on the authority of the last preceding case. *The King, v. Hawkswood. Ante 480.*

The KING, v. COLIN RECULIST, Old-Bailey, January sessions, 1796, the above objection was revived.

The prisoner was tried on an indictment for uttering a promissory note, knowing it to be forged, with the name of *William Howard*. The note had no stamp upon it, and it was therefore contended that it could not be given in evidence, and the stamp-acts were cited.

The jury found the prisoner guilty; but THOMPSON, B. respited the judgment, for the opinion of the judges.

GROSE, J. in *May sessions* following, delivered the opinion as follows: The crime, as charged against the prisoner, by the words of the indictment, was clearly and satisfactorily proved, the objection therefore does not import the smallest doubt of his guilt, or in any way affect or relate to the legal definition of forgery; for it is clear that he knowingly uttered a false instrument, with an intention to defraud, which is the precise offence that the laws against forgery aim to suppress. The proposition arising from this objection is, that the paper writing stated in the indictment is not a promissory note, because it is not upon a stamp; but the question, whether it is or is not a promissory note, depends upon the *tenor* of the instrument, and not upon the circumstance of its being stamped or not stamped. An instrument in writing, by which one person promises to pay to another person so much money, must by force of the words be a promissory note, and the paper writing, in the present case, is an instrument precisely of that description. But admitting it to be a promissory note, it is contended that it cannot be given in evidence as such, because it is not stamped. It has, however, been determined in the *King, v. Hawkswood*, that a bill of exchange, though not stamped, is an instrument on which forgery may be charged;

charged; and the reason given in that case is completely satisfactory, namely, that the stamp acts being revenue laws, and not intended to affect the crime of forgery, cannot alter the law respecting it. *Leach. Cr. Ca. 3 edit. p. 392. Ante 480.*

The stamp is not, properly speaking, any part of the instrument; it is merely a mark impressed on the paper, to denote the payment of a duty; and is merely collateral to the instrument itself. To constitute the crime of forgery, it is not necessary that the instrument charged to be forged should be such as would be effectual if it were a true and genuine instrument; for it has been decided in several cases, that to forge the last will of a person who is not dead, is a capital offence; and yet such an instrument never could operate as a will, in contemplation of law, during the life time of the supposed testator. *Rex, v. Cogan. Leach's Cr. Ca. 3 edit. 583. Ante Rex, v. Sterling. Leach's Cr. Ca. 3 edit. 117. Ante 429.* And Vide the *dutcheffs of Kingstons case. Ante 439.*

So also in the case of JAPHET CROOK, it was determined that forging a lease and release of lands is a capital offence, although drawn under circumstances, which if they had been genuine, would have rendered them ineffectual. 2 *Stra. 901.*

The promissory note in the present case is of this kind. The purpose for which stamps are ordered to be affixed to various instruments, is merely to raise a revenue; and as to the statutes enacting, "That no promissory note, bill of exchange, &c. not stamped as therein directed, shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or equity;" the legislature thereby meant only to prevent their being given in evidence when they were proceeded upon to recover the value of the money thereby secured.

It is certain, that no holder of such an instrument as the present, could, if it had been genuine, have founded an action upon it, and given it in evidence as a *promissory note*; but it is equally certain, that it might have been given in evidence on other occasions; as for in-

stance, if any person negotiating it were to be sued for the penalty inflicted upon the offence of negotiating such an instrument unstamped, there is no doubt but that it might be given in evidence; and this instance shews most clearly, that it was properly received in evidence on the trial of this indictment, notwithstanding the seeming prohibitory words of the statutes. The most material point of consideration in this case was, whether it did not differ from *Hawkwood's* case, in as much as the bill of exchange there might have been afterwards stamped, as the law then stood, and this promissory note as the law now is, could not: but the same argument applies to this case as was used in that; namely, that the stamp-acts are revenue laws; that the crime of forgery is a false making of any instrument with intention to defraud; that the stamp-acts do not destroy its nature as a promissory note, but only prevent a recovery from being had on it; and that if the argument in support of the objection were permitted to prevail, the most pernicious consequences would ensue; for then by a parity of reasoning, the forging of a note upon paper, whereon there is a stamp of less value than the law requires, or a bond, or lease and release, or any other instrument wherein a stamp is required, might be practised with impunity.

Upon these grounds it is, that a majority of the judges are most clearly of opinion, that there is no foundation for this objection, and that the conviction is good and valid. *Leach's Cr. Ca. 3 edit. 811.*

The case of *WITHWELL, and others*, assignees, &c. *v. DIMSDALE, and others*, *Nisi Prius, Mich. 33 Geo. 3.* seems to shew that lord KENYON was not among the majority of the judges who acceded to the opinion of Mr. justice BULLER, in the case of *Hawkwood*. The case of *Withwell, v. Dimsdale*, was, *derivative* for the bill of sale of a ship delivered by the bankrupt to the defendants. Amongst other pleas, the defendants pleaded one, putting the bankruptcy in issue.

The plaintiff offered a paper writing, purporting to be an agreement made between the bankrupt and his sons, by which the former agreed to assign his effects to the latter. It was not stamped.

Erskine

Erskine contended, that though not evidence, of an agreement, yet this paper might be read to prove that the bankrupts were in a failing state, and had an intention of defrauding his creditors, and mentioned a case, (probably *Hawkefwood* or *Lee's*), in which a man was convicted for forging an instrument not stamped.

Lord KENTON, C. J. said, he was of opinion that this paper writing could not be given in evidence, for *any purpose whatsoever*, either to establish or defeat it, *nor did he agree with the case cited as to the forgery*. The plaintiff produced other evidence, and obtained a verdict. *Peake's Cases at N. P.* 167, 168.

CHAPTER VI.

When and how far it is necessary to prove the appointments of a public officer, or his authority, by written warrant, and in what cases it is necessary to produce the written authorities under which he acts.

THE rules in this chapter result from the great general rule—the best evidence the nature of the case admits of must be given. *Vide Book 1. Rule 1. p. 342.*

Rule the First.

It is a general rule, that where it is necessary to prove that a person is in a public office or capacity, it is sufficient to shew that they acted upon the occasion as officers in their respective offices and capacities without producing the written instrument by which they were severally appointed.

And therefore in *CREW, qui tam, v. SAUNDERS, Hilary, 8 Geo. 2. B. R.* Action, on *stat. 9 Ann. ca. 10. sec. 44.* for intermeddling at an election, the defendant being a *post-master*. It was moved, on behalf of the plaintiff, for liberty to inspect the post-office books, and take a copy of the defendant's deputation.

This

This was opposed on behalf of the post-office, they not being a party to the suit, on the authority of doctor *Wess's* case, *Hil. 12 Ann.* who was denied liberty to inspect the books of the college of physicians. And *Underhill v. Durham, Andr. 247.* When the plaintiff was denied inspection of the books of the dean and chapter, they being no parties, and *Shelling v. Farmer. 1 Strange, 646,* was also cited.

On the other side, this case was compared to that of *court rolls*, and entries in the custom-house, bank, and south-sea books; but,

The court said, that inspecting court-rolls was the original of these motions, but then it was confined to the case of persons interested, the rolls being the common evidence, which of necessity must be kept in some one hand. But lords and tenants of different manors have always been denied as strangers. In the case of public companies, it is restrained to the entry which concerns the party himself: and as to the custom-house books, they are really the merchants' books for that purpose. The constitution of the officer is *private*, and therefore not necessary for the plaintiff to prove; and as against the defendant, his *acting* will be sufficient. 2 *Strange, 1005.*

So in *RADFORD, quitam, v. McINTOSH, Easter, 30 Geo. 3.* Action on *Stat. 27 Geo. 3. ca. 26.* It was held that in an action for penalties on the *Post-horse Act*, brought by the farmer of the tax, it is not necessary for the plaintiff to give in evidence his appointment by the lords of the treasury, or the commissioners of the stamp-duties authorized by them. Proof that the defendant hath accounted with him, as *farmer*, for the duties is sufficient. 3 *Term. Rep. 632.*

In the same case lord KENTON, C. J. observed, that in penal actions on 2 & 3 *Edw. 6. sec. 2.* which enables the owners of *tithes* to recover double their value in case they are withdrawn, it hath always been held sufficient proof against the defendant that the *party suing* is in the *act of receiving tithes from him.* 3 *Term Rep. 635.*

BULLER, J. added—It appears that the defendant hath treated with the plaintiff in the character of *farmer-general.*

general. Then this comes within the class of cases for *non-residence*, where it is sufficient to prove the defendant in possession of the church *without* proving presentation, institution, and induction, as was held in *Bevan, qui tam, v. Williams* (*East*. 16 Geo. 3. B. R.) 3 Term Rep. 635.

So in *BENYMAN v. WISE, Trinity*, 31 Geo. 3. which was an action by an attorney, for words spoken of him in his profession, the COURT held that the plaintiff need not prove that he is an attorney by his admission, or by a copy of the roll of attorneys; for that proof that he acted as an attorney is sufficient. 4 Term Rep. 366.

Rule the Second.

In the case of custom-house officers, evidence is admitted both in criminal and civil suits, to shew that the party is a reputed officer. 4 Term Rep. 366.

As in the *KING v. SHELLY. Old-Bailey, July sessions, 1784*. The prisoner was indicted on *stat. 19 Geo. 2. ca. 34.* for punishing persons rescuing unaccustomed goods seized as being liable to pay duties, &c. *Irisb*, 37 Geo. 3. ca. 30.

The indictment stated that the prosecutors were excise officers, and that the goods seized were unaccustomed goods. No evidence was produced to prove these averments, but what was to be collected from the testimony of the prosecutors themselves, and it was submitted to the court, by the prisoner's counsel, that these averments being facts positively alledged, they ought to be positively and substantially proved.

In answer to this point, the *stat. 11 Geo. 2. ca. 30. sec. 32.* was cited, by which it is enacted, that excise officers acting in the execution of their duty, shall be taken to be excise officers, until the contrary shall be made appear; for that in all cases the *onus probandi* is thrown upon the prisoner. The point was over-ruled. *Leach Cr. Ca. 2 edit. 278. 3 edit. 381.*

This decision is corroborative of what was said by BULLER, J. in *BENYMAN v. WISE*, above cited. That in the case of excise and custom-house officers, even before the *stat. 11 Geo. 1.* evidence was admitted both in criminal

criminal and civil suits to shew that the party was a reputed officer. 3 *Term Rep.* 366.

Rule the Third.

In the case of peace-officers, justices of the peace, constables, &c. it is sufficient to prove that they acted in those characters, without producing their appointment; even in the case of murder. 3 *Term Rep.* 366.

In the *KING v. WINNIFRED and THOMAS GORDON*, *spring assizes, Northampton*, 29 *Geo.* 3. This point was solemnly determined.

The prisoner *Thomas Gordon*, a youth, was tried with his mother (who was charged as accessary) on an indictment for the felonious and wilful murder of *George Linnel*, he being then and there constable of *Patteshall*, in the county of *Northampton*, and was convicted.

Several points of law were submitted to the court by the prisoners counsel.

THOMPSON, Baron, reserved these questions for the opinion of the twelve judges; and the first of these questions was—

Whether that as the indictment alledged that *Linnel*, the deceased, was the constable of the parish, it was not incumbent on the prosecutor to prove that fact by shewing that he had been duly elected into office?

These points were argued in the Exchequer-chamber on Wednesday the twenty-fourth of June, 1782.—*Galley*, for the prisoners; *Dayrell*, for the crown.

HOTHAM, Baron, at the *summer assizes, held for the county of Northampton*, 1789, informed *Thomas Gordon* that the judges were of opinion that the case was fully proved against him, and he was executed. *Leach's Cr. Ca.* 2 edit. 412. 3 edit. 581 to 586.

Rule the Fourth.

If an officer to whom a warrant is directed be killed in attempting to make the arrest, it is murder, though it should appear upon evidence that the warrant is irregular or illegal.

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The illustration of the above rule appears in the *KING, v. the INHABITANTS of WINWICHE, Banco Regis, 40 Geo. 3.*

A magistrate, who kept by him a number of *blank warrants, ready signed*, (by another justice) on being applied to, filled up one of those, and signed and delivered it to the officer, who, on endeavouring to arrest the party, was killed; the judges were of opinion, that this was murder in the person killing the officer, and he was accordingly executed. And says lord KENYON, C. J. who cited the case, this was not a new principle then for the first time established, it has always been uniformly acted upon. *7 Term. Rep. 455.*

NOTE. For though a justice of the peace cannot grant, and of course cannot justify the granting a blank, or any other irregular or illegal warrant, yet the officer, who acts merely ministerially, is justifiable in executing any such warrant delivered to him by a magistrate, for any felony, or misdemeanor, within the magistrate's jurisdiction; and therefore the killing an officer acting under, and by direction of such warrant, is murder, and of course the evidence of an arrest by such illegal warrant is no justification for the prisoner. Vide *2 Hawk. Pl. Cr. ca. 13. 7 edit. vol. 4. 172.*

Rule the Fifth.

On the execution of a civil process, the breaking of the outward door is illegal; and the officer must produce in evidence, not only the *warrants* but the *writs*, under the authority of which he acted, otherwise if he be killed, the offence will only amount to manslaughter.

As in the *KING, v. DANIEL TAYLOR, Maidstone, lent assizes, 1767*, before HEATH, J. The defendant was indicted on the *Black-act, stat. 9 Geo. 1. ca. 22. sect. 1.* for maliciously shooting at one Beer, a sheriff's officer. It appeared in evidence, that the prisoner had mortgaged a house to Harvey, that judgment in ejectment had issued, and the mortgagee had executed a writ of possession. The writ of possession being opposed, the mortgagee issued process to hold the prisoner to bail for the mortgage money,

and employed *Beer* to arrest him. The prisoner being in the house, of which he had obtained *forcible possession*; *Beer*, with *Harvey* and other assistants, broke open the outward door, went up stairs, and found the prisoner on the landing-place armed with a loaded gun. They informed him that they came to arrest him, to which he answered, that he would not be taken, and, if they attempted to arrest him, he would shoot them, upon which they retired to the outward door followed by him, pointing the gun at them. Further assistance was sent for and came, whereupon the prisoner discharged his gun at *Beer*, and shot the contents through his hat, whereupon, with difficulty, he was taken.

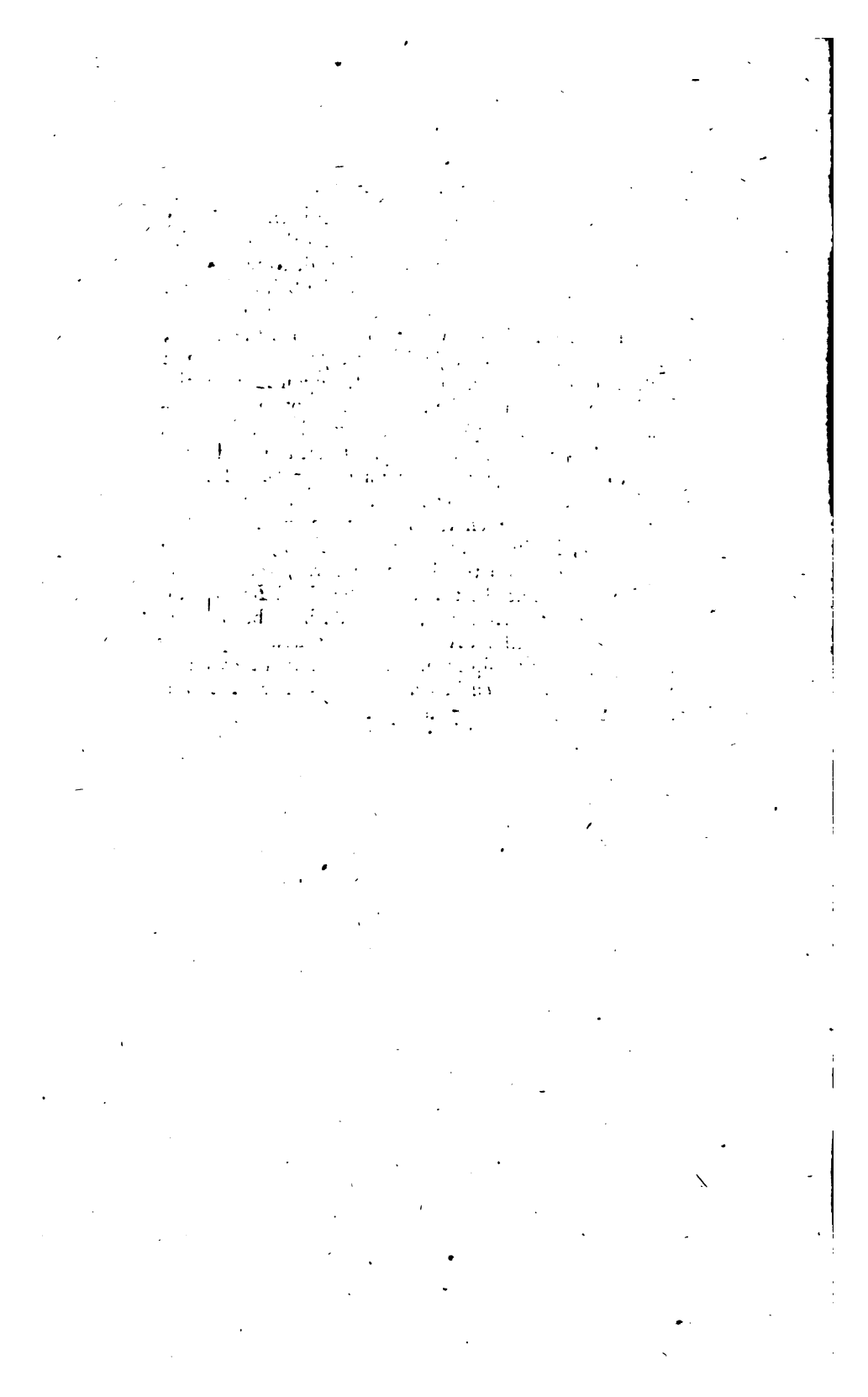
After proving those particulars, evidence was also given of the time of issuing the writ of possession, the delivery of the warrant thereon to *Beer* the officer; and that pursuant thereof, he had given possession to *Harvey's* attorney, who was duly authorized to receive it, by letter of attorney from *Harvey*, and that such attorney had afterwards delivered the key of the house to a third person, to keep possession for *Harvey*. Such third person being called upon, gave in evidence that he had been in possession of the key ever since it had been delivered to him, but that he had heard that the prisoner had broken into the house again.

Next were proved, that the writ of *capias*, to arrest the prisoner for the mortgage money, had issued, and the delivery of the warrant thereon to *Beer*, in order to arrest the prisoner; and it further appeared in evidence on these particulars, that the writs themselves are never delivered to the officers, but are filed in the sheriff's office, and that therefore the prosecutor had them not to produce on the trial; and it also appeared that *Beer* and his assistants, at the said time of breaking open the door to arrest the prisoner, had with them the warrants on the writs of possession and *capias*, but not the writs themselves.

The prisoner's counsel insisted, that the writs themselves ought to be shewn in evidence, to prove that warrants, under which the parties had acted, had legally issued, in order to justify the forcible entry of the bailiff and his assistants, either to retake the possession or to arrest

arrest the prisoner ; and that although the warrants might be sufficient evidence upon questions between the sheriff and his bailiff, yet as between *them* and the *public* the writs must appear to have regularly issued, from the production of them in evidence, though the bailiff need not have them with him at the time of the execution thereof.

HEATH, J. To intitle you to break open the house, you should have gone to a *justice of the peace*, for though the prisoner had made a forcible entry upon *Harvey*, the bailiff had no right to make a forcible entry on him without a *warrant* from a *justice*. There would be no end else, but perpetual warfare in society. Indeed it seems too much to convict the prisoner on this *statute*, for the breaking of the house, by *Beer* and his assistants, was clearly illegal. The charge is, that he *maliciously*, &c. shot at *Beer*, having a warrant to arrest him, and though the prisoner got into the house by force, yet being in actual possession at the time, had he killed *Beer* in this illegal attempt to arrest him, he would have been guilty of *manslaughter* only. And as to the *writs of possession* and *capias*, his lordship seemed to think, that they ought to have been produced in evidence as well as the warrants. *Stubb's Cr. Cir. 7 edit. 371.*



THE
RULES OF EVIDENCE

ON

Pleas of the Crown,

ILLUSTRATED.

BOOK IV.

ON EVIDENCE NECESSARY TO MAINTAIN AN
INDICTMENT, AND EVIDENCE APPLICABLE TO
GENERAL ISSUES IN PLEAS OF THE CROWN.

CHAPTER I.

On the application of Evidence given to support an indictment on a statute, when that evidence fails in supporting the charge under the statute, but is sufficient to support the same charge at common law.

Rule the First.

It was formerly generally taken, that no indictment grounded on a statute, and which concludes *contra formam statuti*, and cannot be made good, by the statute, can be maintained as an indictment of an offence at common law. 2 Hawk, P. L. ca. 35. ca. 46. 7 edit. vol. 4. 70, and 450.

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The chief reason is, that the prosecution is intended to be grounded on a foundation which will not support it. *Ibid.*

HALL, in support of the old rule, says, an indictment grounded upon an offence made by act of parliament must by express words bring the offence within the substantial description made in the act of parliament, and those circumstances mentioned in the statute to make up the offence, shall not be supplied by the general conclusion, *contra formam statuti*. And such indictment shall be quashed, and the party shall not be put to answer it. *Hale, P. C.* 170, 171.

As in PENHALLO's case, *East. 33 Eliz. B. R.* indicted upon the 5 *Edw. 6.* for drawing his dagger in the church of *B.* against *I. S.* and doth not say, (according to the statute) "*to the intent to strike him,*" and for this cause it was void. But then it was moved, if this were not good, as for an assault, he might be fined upon it. But *per CURIAM* it is void in all; for being indicted upon the statute, it is void as to an offence at the common law. *Cro. Eliz.* 231. *The Queen v. Hall, and others, Cro. Eliz.* 307. *Eden's ca. Cro. Eliz.* 697. *Cholmley's case. Cro. Car.* 465. *Bennet v. Talbot, 1 Salt, 212.*

From these cases it appears, that though the evidence given would support an indictment at common law, yet if the indictment concluded against the statute the defendant was acquitted and discharged, as if the whole proceeding had been *coram non iudice*,

Rule the Second.

Where a person is indicted upon a statute, and the evidence doth not bring the case within the statute, but yet proves the offence charged in the indictment, as it is an offence at the common law, the defendant may be found guilty at the common law, and the words *contra formam statuti* may be rejected as surplus. *Hawth. P. C. ca. 25 and 46. 7 edit. vol. 4, 450.*

So in PAGE's case, it was resolved, that if persons be indicted specially of the statute of stabbing, and the evidence be not sufficient to bring them within the statute, they

they may be found guilty of man-slaughter at common law; and the words *contra formam statuti* shall be rejected as senseless where the offence is prohibited by the common law only. *Ibid. Siderf. 420. 2 Keb. 128. The King v. Smith. Dougl. 445.*

And in the *KING v. MATTHEWS. Hil. 33 Geo. 3. B. R.* Indictment for an offence at common law, concluded *contra formam statuti*.

Gibbs moved an arrest of judgment; and assigned, as one cause of error in the record, "because the offence "is laid to be *against the form of the statute*," and it is only an offence at common law, and cited *Cholmley's case, Cro. Car. 465.*

The COURT said there was no foundation for the objection. It had been frequently over-ruled and determined, that the words "*against the form of the statute*," might be objected as surplusage. *5 Term. Rep. B. R. 169. In the King v. Bathurst, Sayer 225, and in the King v. Kettleworth, East. 32 Geo. 3. B. R. the court ruled the point as above.*

NOTE—*Cholmley's case*, cited in the above case by *Gibbs*, was for an assault in a church, against the statute. The objection was, that the indictment is *contra formam statuti*; and this offence is not punishable by the statute, unless that he smote with a weapon, or drew a weapon in the church or church-yard, or drew a weapon to that intent; and by the second clause in the statute for smiting or laying violent hands, it is excommunication, *ipso facto*; and it is not mentioned here how he struck—and therefore the JUSTICES doubted. *Cro. Car. 465. Ante 494.*

CHAPTER II.

How far the Evidence given against a defendant on his trial, as principal, can affect him, where the facts shew him to be accessory.

Rule.

A DEFENDANT cannot be found guilty on an indictment against him as *principal*, which only proves him to have been *accessary* before the fact: but he, on such evidence, shall be discharged from the indictment. *Hawk. P. C. ca. 35, and 46. 7 edit. vol. 4. p. 319. 450. Vide Ante 463, 464.*

CHAPTER III.

As to the certainty of the Day laid in the Indictment.

Rule the First.

IN all cases, the day laid in the indictment or appeal is *not* material upon evidence; but the defendant may be convicted upon proof of a fact at any other time whether *before* or *after* the day laid, so that it be *before* the time when the indictment or appeal was preferred. 2 *Hawk. P. C. ca. 46.*

COKE and HALE support this rule. They say, if a man be indicted for felony or treason, suppose the 31st of April, 24 Car. and in truth the offence was committed 1st June, 24 Car. yet he shall be convicted notwithstanding the variance, for the day is not material. Yet danger and trouble may ensue by the relation of such attainer to the day mentioned in the indictment; therefore the jury should find the true day. 2 *Inst.* 318. 3 *Inst.* 230. 1 *Hale. P. C.* 361. 2 *Hale, P. C.* 179.

So

So in the KING v. sir HENRY VANE. *Trinity*, 14 Car. 2. anno 1662, indicted for high treason. Although the treason for compassing the king's death was laid in the indictment to be the 30 May, 11 Car. 2. Yet upon the evidence it appeared that sir Henry Vane, the very day the late king was murdered, did sit in council for the ordering of the forces of the nation against the king that now is, and so continued all along, until a little before the king's coming in. It was resolved that the day laid in the indictment is not material, and the jury are not bound to find him guilty *that day*; but may find the treason to be, as it was in truth, either before or after the indictment, as it is resolved in *Syer's case*, 3 Inst. 230. And accordingly, in this case, the jury found sir Henry Vane guilty on the 30th of January, 1 Car. 2, which was the day the late king was murdered; and so all his forfeitures relate to that time, to avoid all conveyances and settlements made by him. *Kelyng*, 16. 2 St. Tr. 435.

The QUEEN v. SYER, (cited above) is curious. The defendant was indicted at a *sessions of the peace* for the county of *Norwich*, at *Norfolk*, 32 Eliz. The indictment was for burglary laid to be committed, 1 Augusti, 31 Eliz. whereunto Syer pleaded not guilty.

Upon the evidence it appeared that the burglary was committed 31 September, 31 Eliz. so as at the time alleged in the indictment there was no burglary done; and it was conceived that the very true day was necessary to be set down in the indictment; for that the judgment doth relate to the day in the indictment, and so avow feoffments, leases, &c. for that (as it was also conceived) the feoffee, lessee, &c. when the attainder is upon a verdict, should not falsify the time of the felony; and thereupon the jury found Syer not guilty.

At the same sessions Syer was again indicted for the same burglary, done 1 Sept. 31 Eliz. when in truth it was done. And he that gave the charge at sessions doubted whether upon this matter Syer might not plead
† *autre foitz acquit* for the same burglary, (for seeing the offender is allowed no counsel, the court ought to do him justice and assign him counsel *in favorem vite*, though

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* These words must change place.

† *autre fois*

he demand it not, to plead any matter of law appearing to the court for his discharge) and therefore he stayed the proceedings against him, and the assizes being at hand, he acquainted the justices of assize with this case, and with the doubts conceived thereupon.

WRAY, C. J. and PERRYANE, J. answered him, that the like case had been lately propounded by *Perryane*, J. to all the justices of England, and by them three points were resolved: *First*, That the crown was not bound to set down the very day when the treason, felony, &c. was done; but the day set down in the indictment, being before or after the offence done, the jury ought to find him guilty, if the truth of the case be so; and if it be alledged before the offence done, to find the day when it was done in *rei veritate*, for they are sworn *ad veritatem dicendam*, and then the forfeiture shall relate but to the day in the verdict, which was the day of the offence done, and not to the day in the indictment. *Secondly*, That if the triers found the offender guilty generally, yet the feoffee, or lessee, &c. if the offence be alledged in the indictment before it was yet done, to their prejudice, may falsify in the *time*, but *not* in the *offence*. For seeing the crown is not bound to set down the very just day when the treason or felony, &c. is done, and that the triers have chief regard and respect of the offence itself, God forbid but that the subject might falsify as concerning the time of the offence. *Thirdly*, If the offender be found not guilty, he in that case might plead upon a new indictment *autre fois acquit*, and so *Syer* in the case aforesaid did, and was thereupon discharged. 3 *Inst.* 230.

Rule the Second.

Evidence may be given of a treasonable conspiracy, &c. at any time before or after the time alledged in the indictment; and at any place.

So resolved in the KING, v. ROBERT CHARNOCK, and others, *Old-Bailey sessions*, 8 *Will.* 3. before HOLTY, C. J. when the following reasons were assigned.

autre fois

First,

First, Because it is only a circumstance and of form; some day must be alledged, but the precise day is not material.

Secondly, The indictment lays it at divers days and times, as well *before* as *after*, and thereby comprehends what was done *last year* as well as *this*; and as the evidence may be of matters *before* that time, so it may be of matters also at any time after the time specified in the indictment, provided it be not after the time the indictment was found; neither is the evidence upon *place*, for it may be of *any* place, provided it be not out of the county. 1 *Salk.* 288. 4 *St. Tr.* 554, 579, 596. Vide *ca. on Conspiracy, Post*

Rule the Third.

The *stat. 7 Will. 3. ca. 3. (English)* makes no exception to the antecedent rules.

As in the *KING, v. FRANCIS TOWNLY, commiss. oyer and terminer, &c. St. Margaret's-hill, Surrey, 20 Sep. 2.* Indicted for high treason, in levying war, &c.

His counsel insisted that the overt-acts are charged in the indictment to have been committed on the *10th day of October*, and that all the evidence is of overt-acts *subsequent* to that time. That however the resolutions with regard to the points may have been before *stat. 7 Will. 3. ca. 3.* (as in *Charnock's case*) yet now by that act, no evidence is to be given but of overt-acts laid in the indictment; and, consequently the overt-acts must be proved in such manner as laid in the indictment. That in this case especially, the king's counsel are not at liberty to vary in their proofs from the *day laid*, since they have confined themselves in the indictment to *one day*, and have not charged, as in most of the precedents is charged, that the defendant did commit the treason charged on him on the *day laid*, and divers days and times, as well *before* as *after*.

The *solicitor-general (Murray, after earl MANSFIELD, C. J. B. R.)* answered, that the *7 Will. 3.* makes no alteration in regard to this point, so as to make either *time* or *place* more material than they were before the act;

the act, indeed, saith that no evidence shall be given of any overt-acts not laid in the indictment. But what is, or is not evidence of such overt-acts, is left upon just the same foot in this respect as before the act; what was evidence at common law is, in this respect evidence still; and as to the charging the overt-acts, and divers days and times, as well before as after the day particularly mentioned, the greatest part of the precedents he had seen for levying war, which is the present case, do charge the overt-acts on *one* day only.

The COURT over-ruled the objection. *Townly's case*. *Foist. 7.* 11 *St. Tr.* 543.

Rule the Fourth.

Where the time *proved* varies from that *laid* in the indictment or appeal, the jury may either find the prisoner guilty generally, in which case the forfeiture shall relate to the time laid, until the verdict be falsified by the party interested, as it may be in this respect, though not as to the point of the offence, or they may specially find him guilty on the day on which the fact is proved, whether before or after the day laid in the indictment or appeal, in which case the forfeiture shall relate to the day so specially found. 2 *Hawk. P. C. ca.* 46. *Summ.* 264, 270. *Syer's case.* 3 *Inst.* 230. *Ante* 496. *Kely.* 16. *Sir Henry Vane's case.* 2 *St. Tr.* 435. *Ante* 497.

But where a verdict *expressly* finds a defendant guilty, before the time laid in the indictment or appeal, whether it may be falsified as to the time, by the party interested, as it may be, where it finds him guilty generally of the offence in the indictment or appeal, upon evidence of a fact *after* the time laid, may (saith *Hawkins*) be deserved to be considered. 2 *Hawk. P. C. ca.* 46.

On the trial of lord BALMERINO, *before the lords*, 20 *Geo.* 2. 1746, for high treason. The prisoner, who had no counsel, said, "Observe, that none of the witnesses have agreed upon the day charged in the indictment; and I have nothing else to say." This objection he afterwards explained to mean, that "it was not
" proved

" proved that he was actually at Carlisle when it was taken by the rebels."

The LORDS inquired of the JUDGES, " Whether it is necessary, that an overt-act of high treason should be proved to have been committed on the *particular day*, laid in the indictment?"

LEE, C. J. answered, " We are all of opinion, that it is *not* necessary to prove the overt-act to be committed on the particular day laid in the indictment. But as evidence may be given of an overt-act *before* the day, so it may be *after* the day specified in the indictment; for the day laid is circumstance and form only, and not material in point of *proof*: and this is the known constant course of proceedings in trials." 9 *St. Tr.* 606. *Foss.* 9.

CHAPTER IV.

Of proving the certainty of the Place laid in the Indictment.

Rule the First.

WHERE a *place certain* is made part of the description of the fact charged in the indictment against the defendant, the least *variance* as to such place, between the evidence and the indictment is fatal. 2 *Hawk. P. C. ca.* 46. 7 *edit. vol.* 4. 451.

As if a trespass for taking away goods is alledged, in such a parish, in a play-house in *Lincoln's-inn-fields*, and in evidence it appears to have been done at a house of a *different* person; or that there is *no* play-house in *Lincoln's-inn-fields*. 2 *Hawk. P. C. ca.* 46. *Fielding's Pen. Law*, 317.

As in the *KING v. DURORE*, *Old-Bailey*, *December session*, 1784. *L. H. S. Durore*, Esq; was indicted before HOTHAM, B. on the *statute* 9 *Geo. 1. c.* 22. for maliciously shooting at *Henry Sandon*, in the dwelling-house of *James Brewer*

Brewer and John Sandy: but it appeared upon evidence, that the dwelling-house belonged to *John Brewer* and *James Sandy*.

COURT. This is a fatal variance. The prosecutor hath thought proper to state the names of the owners of the house, where the fact is charged to have been committed; perhaps this averment was not necessary to the validity of the indictment, for the statute says, "who shall maliciously shoot at any person, in any dwelling-house, or other place," but having averred that it was in the dwelling-house of *John Brewer* and *James Sandy*, the prosecutor is bound to prove it as it is laid. Now the evidence is, that *Brewer's* christian name is not *John* but *James*, and that *Sandy's* christian name is not *James* but *John*, and when a man is charged with a capital offence, every strictness which the law requires must be attended to. The prisoner was acquitted. *Leach's Cr. Ca. 2 edit. 282. 3 Edit. 390. MS.*

So in the *KING v. WHITE*, *Old-Bailey session, 1783*, before *BULLER* and *GROSE, J's*. The prisoner was indicted for burglary in the dwelling-house of *John Snoxall*, and stealing therein goods the property of *Anne Locke*. It appeared in evidence, that the house was not the dwelling-house of *John Snoxall*.

The COURT therefore held, that the prisoner could not be found guilty either of the burglary or stealing in the dwelling-house, to the value of forty shillings, under *stat. 12 Ann. ca. 7*. for it is essential in both cases, to state in the indictment the name of the person in whose house the offence is committed, and truly to prove that averment on the trial. *Leach's Cr. Ca. 2 edit. 216. 3 edit. 286. MS.*

In the *KING, v. WILLIAM WOODWARD*, *Old-Bailey sess. October 1785*. The defendant was indicted for stealing in the dwelling-house of *Sarah Lunnes*. It appeared in evidence, that her name was *Sarah Lunden*.

ADAIR, Recorder, held the variance fatal to the capital part of the indictment. *Leach's Cr. Ca. 216.*

Rule the Second.

But a place laid only for a *venue* in an indictment or appeal is no way material upon evidence ; but proof of the same crime at any *other* place, in the *same* county, maintains the indictment or appeal as well as if it had been proved in the very same place. 2 *Hawk. P. C. ca. 46. Vide Charnock's case. Ante 498.*

As in *Mr Henry Van's case*, wherein it was resolved, that the the treason laid in the indictment being the compassing the king's death, which was in the county of *Middlesex*, and the levying war being laid as one of the *overt-acts* to be the compassing of the king's death, though this levying of war be laid in the indictment to be in *Middlesex*, yet a war levied by him in *Surrey* might be given in evidence : for being *not* laid as the *treason*, but only as the *overt-act*, to prove the compassing, it is a transitory thing which may be proved in another county. But if an indictment be for levying war, and that made the treason for which the party is indicted, in that case it is local, and must be laid in the county where in truth it was. *Kelyng 15. Ante 497.*

So in the case of *JOSEPH CLARKE*, indicted in *London* for high treason, for coining of money. Upon the evidence it was proved against him in *London*, as it ought to be, the indictment being there : but a great deal of more evidence was given against him of committing the same crime in *Middlesex* and *Essex*, which was agreed to be good evidence to satisfy a jury. *Kelyng 33. 2 Hale, P. C. 291. 2 Hawk. P. Cr. ca. 25. Cro. Eliz. 911. Crisp. v. Verral. Yelv. 12. Gurnons v. Hodges.*

Rule the Third.

After a crime hath been *proved* in the county in which it is laid, evidence may be given of other instances of the *same* crime in *another* county, in order to satisfy the jury. 2 *Hawk. P. C. ca. 46. Clarke's ca. above cited.*

So ruled in lord *PRESTON's case* by *HOLT, C. J. 4 Str. Tr. 410.* and *HENSEY's case*, by earl *MANSFIELD, C. J.* who said,

said, "as to *locality* of facts, it is certain that some *one* overt-act must be proved in the county where the indictment is laid: indeed if any one be so proved in *that* county, it will let in the proof of others in other counties. *Burr.* 646 to 650. *Fost.* 196.

Rule the Fourth.

Where the defendant is indicted for high treason in compassing the king's death in *one* county, and levying of war in the same county, is laid as an overt-act of such treason, and proved in the same county by one witness, the levying of war in *another* county may also be proved by another witness. 2 *Hawk. P. C. ca.* 46.

So determined in sir HENRY VANE's case. *Trin.* 14 *Ca.* 2. Sir *Henry Vane* was indicted at the King's Bench for compassing the death of king *Charles* the Second, and intending to change the kingly government of this nation; and the *overt-acts* which were laid, were, that he with divers other unknown persons did meet and consult of the means to destroy the king and government, and did take upon him the government of the forces of this nation by sea and land, and appointed colonels, captains, and officers; and the sooner to effect his wicked design, did actually, in the county of *Middlesex*, levy war.

The prisoner objected that a levying of war in *Surrey* could not be given in evidence to a jury in *Middlesex*.

But the JUDGES resolved that in this case the treason laid in the indictment being the compassing of the king's death, which was in the county of *Middlesex*, and the *levying of war* being laid only as one of the *overt-acts* to prove the compassing of the king's death, though this levying of war be laid in the indictment to be in *Middlesex*, yet a war levied by him in *Surrey* might be given in evidence.

But it was agreed at the same time, that if an indictment be for *levying war* and *that* made the treason for which the party is indicted, in that case the offence charged is *local*, and must be laid in the county where in truth it was. *Kelyng* 15.

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The above determination was ruled to be law in the case of *Thomas Theodosius Deacon*, for high treason, 20 *Geo. 2*. In this case an objection was taken by the prisoner's counsel, that a fact proved was not committed in *Cumberland*, the county where the venue of all the overt-acts was laid.

ABNEY and FOSTER, Justices, held, that it is indeed necessary on this indictment that *some* overt-act laid be proved on the prisoner in *Cumberland*, but that being done, acts of treason tending to prove the overt-acts laid, though done in a foreign county, may be given in evidence. 9 *St. Tr.* 558. *Fost.* 9.

Rule the Fifth.

The levying of war can in no case be given in evidence as an overt act in any county in which it is *not* laid, unless it tend to prove some overt-act that is expressly laid. 2 *Hawk. P. Cr. ca.* 46.

CHAPTER V.

Of Evidence which may be given on an Indictment for treason, notwithstanding the stat. 7 Will. 3. sec. 8.

Rule the First.

NO evidence shall be admitted or given of any overt-act, that is not expressly laid in the indictment against any person or persons whatsoever. *English stat. 7 Will. 3. sec. 8.* *

Rule the Second.

But *circumstances* not laid in the indictment, may be given in evidence, notwithstanding the provision of the above cited statute. 7 *Will. 3. sec. 8.*

FOSTER, in his reading upon this section of the above cited statute saith—

* This statute never passed in *Ireland*.

In the case of AMBROSE ROOKWOOD in *B. R. 8 Will. 3.* indicted for compassing the death of the king, two of the overt-acts charged were, that he and others met and consulted the proper means of way-laying the king, and attacking him in his coach; and also that they agreed to provide forty men for that purpose.

The counsel for the crown offered to give in evidence that the prisoner produced to one of the conspirators a list of the names of a small party which was to join in the attempt, and of which he was to have the command, with his own name at the head of the list, as their commander. This evidence was opposed by the prisoner's counsel, because the *circumstance was not charged* in the indictment; and this clause of the act was much pressed.

But the court said, that this circumstance, if proved, amounting to a direct proof of the overt-acts which were laid, *viz.* the meeting and consulting how to kill the king, and their agreeing to provide forty men for that purpose, and falling under the same species of treason, was very proper to be given in evidence. *4 St. Tr. 661. Fost. 245.*

In major LOWICK's case, *Old-Bailey, 8 Will. 3.* the court also declared, that if the circumstances of providing forty men had not been laid, it might, notwithstanding, have been given in evidence; for it was a direct proof of the first overt-act, *viz.* the meeting and consulting the proper means to kill the king. *4 St. Tr. 718. Fost. 245.*

Same rule in the KING v. CHRISTOPHER LAYBE, *B. R. 9 Geo. 1.* His corresponding with the pretender, though not laid, and though made treason by *stat. 12 & 13 Will. 3. Irish. 2 Geo. 1. ca. 4. sec. 3. 4 Stat. at large 322. 19 Geo. 2. ca. 1. 6 Stat. at large 695*, was given in evidence, for it directly tended to prove one overt-act that was laid, *viz.* his conspiring to depose the king, and to place the pretender on the throne.

And this rule was adhered to in Sir JOHN WEDDERBURN's case, *19 Geo. 2.* The overt-acts were laid at *Aberdeen*, in the shire of *Aberdeen*. It was proved by two witnesses that the prisoner was with the rebels at *Aberdeen*,

dean, and by those and other witnesses that he was at divers other places with them.

The king's counsel called witnesses who proved likewise that he was appointed by the pretender's son collector of the excise; and that he did actually collect the assize in several places where the rebel army lay, by virtue of that appointment, for the use of the rebel army.

The prisoner's counsel insisted that this evidence ought not to be admitted; for though collecting money for the service of the rebels is an overt-act, yet it not being laid in the indictment, no evidence ought to be given of it; and they relied on the statute of 7 Will. 3. but in this they were over-ruled, upon the reasons before given in the case of *Deacon*. 9 St. Tr. 580. Fost. 22. Ante 505.

In *VAUGHAN'S case, admiralty Sessions, Old-Bailey, before HOLT, C. J. &c.* 8 Will. 3. it was adjudged in the construction of stat. 7 Will. 3. that where a man is indicted for high treason in adhering to the king's enemies; and certain acts of hostility done by him in a certain ship called the *Clencarty*, are laid as the overt-acts of such adherence, no evidence can be given of any other distinct act of adherence, having no relation to, nor any way tending to prove what was done in the *Clencarty*, though it conduce to prove the same species of treason; and therefore that on such an indictment no evidence can be given of the prisoner's having run away to the enemy in a custom-house boat, &c. 2 Hawk. P. C. ca. 46. 5 St. Tr. 17. 38.

Rule the Third.

But where one is indicted for high treason in compassing the king's death, and a *consult* and *agreement* to assassinate the king is laid as one of the overt-acts of such treason, the defendant's giving about among the conspirators a list of the persons names who were intended to be employed in the assassination, may be given in evidence against him upon such indictment. 2 Hawk. P. C. ca. 46.

So ruled in *Rookwood's case*, because it naturally tends to prove his agreement to the intended assassination, which

agreement is one of the overt-acts laid in the indictment. See *Raskwood's case*. Ante 506.

Rule the Fourth.

Also where the writing of several treasonable letters is laid as an overt-act of high treason, in compassing the king's death, and the purport of such letters is only set forth in the indictment, without a particular recital or description of any of them, the particular letters making good such charge may be read at the trial. 2 *Hawk. P. C. ca. 46*.

Which rule was laid down in the *KING v. FRANCIS FRANCIA*, a jew, *Old-Bailey, January sessions, 3 Geo. 1*. The overt-act was thus laid "And that he the said Francis Francia, did traitorously compose and write, and cause to be composed and written, several traitorous letters, notifying the intention and resolution of him the said Francis Francia, and the other traitors, to move and levy war, &c."

The letters to which this overt-act referred, being offered in evidence, the prisoner's counsel objected to the reading of them; submitting, that the charge of the overt-act being general, that he wrote several treasonable letters, though the crown might support that allegation, by shewing a confession of the fact, of writing several such letters, or might give evidence in general that he did write such letters, yet they could not produce *particular letters*, because every one of such letters would be an overt-act in itself, and they were not laid in the indictment. This objection they grounded on the statutes of treason. By the 25 of *Edw. 3*: though the *intention* was the crime, yet that intention must be declared by *open act or deed*. And by the statute of *William 3*. nothing shall be given in evidence but what is expressly laid in the indictment. If it be allowed under a general charge to prove a number of facts, which are not charged particularly in the indictment, the security of the law will be eluded, and a man will not be able to make a defence, than if it had been laid in general that he had conspired the death of the king; that it had been laid
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and that in order thereto he had been guilty of several treasonable practices : and *Gregg's* case was mentioned, where the letter was set out at large in the indictment. 10 *St. Tr. App. to Hargr.* 77.

But the court held, that here was an overt-act laid, and that it was sufficiently described, and that is all the statute requires. The act says, that no evidence shall be given of any overt-act not expressly laid in the indictment. None can say here is not an overt-act expressly laid. If it is expressly laid and sufficiently described, it is not necessary to mention all the evidence that is to prove the overt-act. The intent of the law is no more than that the overt-act should be sufficiently described and charged. It is here so charged and described ; the design and intention of the letters are set forth ; and they go to prove, that such letters manifesting such design and intention to levy war were written. Here the crime is compassing and imagining the death of the king ; and the writing and sending letters to foreigners to excite a war, is the overt-act, and that act is expressly laid in the indictment which is sufficient, without setting forth the words of the letters. 6 *St. Tr.* 77.

FOSTER saith, that in every indictment for compassing and imagining the death of the king, the queen, or their eldest son and heir ; and also in every indictment for levying war, or adhering to the king's enemies, an overt-act must be alledged and *proved*. For the overt-act is the charge to which the prisoner must apply his defence. But it is not necessary that the whole detail of the *evidence* intended to be given should be set forth ; the common law never required this exactness, nor doth the statute of king *William* require it. It is sufficient that the charge be reduced to a reasonable certainty, so that the defendant be apprized of the nature of it, and prepared to give an answer to it. *Fost.* 194.

Yet there are instances of indictments where the very words charged as treasonable have been set forth.

CHAPTER

CHAPTER VI.

*Of proving the Overt-acts laid in an Indictment for High Treason,**Rule the First.*

WHERE *several* overt-acts are laid in an indictment for high treason, the *proof* of any one of them maintains the indictment, as much as if every one of them were proved. 2 *Hawk. P. C. ca. 46.*

HALE confirms this rule. He saith, that more overt-acts than one may be laid in an indictment for high treason, and then the proof of any *one* of them so laid, they being in law sufficient overt-acts, maintains the indictment. 1 *Hale P. C. 122.*

And FOSTER says it is now settled, that if divers overt-acts be laid, and but one proved, it will be sufficient to support the charge, and the verdict must be for the crown. *Fost. 194.*

As in the KING v. ROBERT LOWICK, *April sessions, Old-Bailey, 8 Will. 3.* indicted for high treason, in compassing and imagining the death of the king; on an objection made by *Mompesson* and *Mr Bartholomew Shower*, counsel for the prisoner, 4 *St. Tr. 718. Ante 506.*

HOLT, C. J. and the rest of the court held, that if several overt-acts be laid, and but one proved, yet the defendant may be found guilty. 4 *St. Tr. 718.*

So in the KING v. CHRISTOPHER LAYER, *at bar, B. R. Mich. 9 Geo. 1. 1722*, the same point was made and over-ruled,

Rule the Second.

From the last rule it results, that where divers overt-acts are laid, and the indictment in point of form happeneth to be *faulty* with regard to some of them, the court will not quash it for these defects; because that
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would deprive the crown of the opportunity of *proving* the overt-acts, which are well laid. *Foss.* 194.

So determined in the *KING v. LOWICK*, in which the objection was argued very much at large by the prisoner's counsel, and mooted by the bench; but

HOLT, C. J. with the unanimous consent of the other judges, declared that if an overt-act be badly laid, yet it may be given in evidence to support an overt-act well laid, for if it were not laid at all, the fact may be given in evidence. 4 *St. Tr.* 417.

CHAPTER VII.

Of variance between the Evidence given, and the matter set forth on the Record.

Rule the First.

WHERE an indictment is for writing a libel *secundum tenorem sequentem*; or for forging a deed so and so described, any, the least variance, between the libel recited, or the deed described, and those given in evidence is fatal. 2 *Hawk. P. C.* 46. 7 *edit. vol.* 4. 453.

Rule the Second.

But where the *substance* only of a libel is set forth it is sufficient, if the libel be proved to have the same sense as is set forth. *Ibid.*

In the *KING v. HALE, Hilary, 7 Geo. 1. B.R.* PRATT, C. J. allowed the libel to be read, saying he would put it upon the defendant to shew that there were material variances. 1 *Stra.* 416.

And the practice now is, on indictments for forgery, libels, &c. that the clerk of the crown reads from the record the matter set forth in the indictment, while the defendant, his counsel or agent, examine the original paper.

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In the *QUEEN v. doctor DRAKE, Michaelmas, 5 Anne, B. R.* Information for a libel, in which were contained divers scandalous matters, *secundum tenorem sequent'* and in setting forth a sentence of the libel, it was recited with *nor*, instead of *not*, but the sense was not altered thereby.

Defendant pleaded not guilty, and this variance appeared upon the evidence, on which the jury found a special verdict.

The COURT held *first*, *cujus quidem tenor* imports a true copy. Vide *Regis* 169. 8 Co. 78. Co. Ent. 508. 2 Saund. 121. *In hac quæ sequitur forma.* 5 Co. 53. *Tenor* is a transcript, and implies the very same.

Secondly, They held that this was not a *tenor*, by reason of this variance, for *not* and *nor* are different, different in grammar, different in sense. And,

Powis, J. held, as to the point where literal omissions, &c. would be fatal, that where a *letter* omitted or changed makes another word, it is a fatal variance; otherwise where a word continues the same. And in the principal case, no man would swear this to be a true copy.

Thirdly, The COURT held, that there was a difference between words *spoken* and words *written*; of the former there could not be a *tenor*, for there was no original to compare them with, as there is of words written, and though there has been attempts to plead a *quorum tenor* of words spoken, it has never been allowed, and therefore where one declares for words spoken, variance in the omission or addition of a word is not material, and it is sufficient if so many of the words be proved and found as are in themselves actionable. Sir John Bruges v. Warenford. Dyer 75. Lady Ratcliffe v. Shubley, Cro. Eliz. 224. Blisset v. Johnson, Cro. Eliz. 503.

Otherwise in debt upon a bond, for upon *non est factum*, the variance is fatal. 2 Roll. Abr. 718.

Fourthly, HOLT, C. J. held, that in pleading there were two ways of describing a libel, or other writing; by the words or by the sense: by the words, if you declare of a libel *cujus tenor sequitur*, &c. or *quæ sequitur in his Anglicanis verbis sequentibus*, you describe it by its particular words, of which each is such a mark, that if

if you vary you fail in making good their description. *Dyer* 203. *Sir Edw. Waldgrave's case*.

If a man bring trespass *quare clausum fregit*, and sets forth abuttals and bounds, and fails in proving them he is gone; and yet he needed not to have described it after that manner. But you may describe it by its sense and meaning. Thus, it is a good information to shew, that the defendant made a writing, and therein said so and so, translating it into Latin, in which case exactness in the words is not material, because it is described by the sense and substance of it. 2 *Salk.* 660, 661. *Heb.* 272.

Rule the Third.

Where the misrecited word is in itself a complete word, though not intelligible with the context, as "air" for "heir," there the variance is fatal; but not if the mutilated word does not make any other word, as "abbey" for "abby." Vide *Abeny v. Wallace*. *Post* 513. The *King v. Beach*. *Post*. 515. And the *King v. May*. *Post*. 516. Doctor *Drake's case*. *Ante* 512.

Rule the Fourth.

In an indictment the words "in manner and form following, that is to say," do not bind the party to recite the instrument on which the charge is brought, verbatim in the indictment; nor does it render mere formal omissions or mistakes fatal. Vide the *King v. Beach*. *Post*. 515. The *King v. May*. *Post*. Doctor *Drake's case*. *Ante* 512.

In *WILLIAMS v. OGLE*, *Hilary*, 4 *Geo.* 2. upon the issue of *nul tiel* record, one was *Segrave*, and the other *Seagrave*; and the court held it no variance, *quia idem sonans*.

Qui tamen, where the party has something else to go by than the sound. 2 *Strange* 889.

In *ALBERRY v. WALLACE*, *Hilary*, 5 *Geo.* 3. *B. R.* *Strange* moved to quash the writ of error, which describes the suit to be between the plaintiff and one *John*

Aleberry, alias *diſſ*. *John Aleberry*, of *Waltham-abbey*, and the alias *diſſ* is *abby* in the record; one is *hey* and the other is *by*. This variance is in the alias *diſſ*, where the court has always obliged the party to describe the specialty *literatim*. And in these cases you never go by the sound, because the party has something else to guide him, and if he mistakes it is not to be imputed to his own negligence. In a plea of misnomer indeed it is otherwise, because there the party has nothing to go by but the sound.

Mich. 13 Ann. the writ was *Crawley*, and the record *Crowley*, *12 Aff. pl. 2. Annsty and Aneſty. Paſch. 4. Geo. 1. Shartleſs and Sharpleſs. Bro. Variance 26. Baxter* with an *s*, and *Baxter* without an *s*, all these were held to be fatal variances in the description of a record, and yet no body will say they might have been taken advantage of by plea of misnomer in abatement. And the reason of all these cases is what is laid down in doctor *Drake's* case, that in all cases where the party has any record or specialty by which he may make an exact description, in such cases the most minute variance is fatal. And *Mr. Justice Pows*, who held with the exception about *not* and *nor* said, that if the court once gave into the solutions of those variances, they would never know where to stop; but being once out at sea, would find it very difficult to steer into harbour again.

But this writ of error would have been well enough, if the alias *diſſ* had been left out, because it is sufficient if the record answers the description; and though it would contain more, yet that excess must of necessity imply a fulness, and if there be a full answer to the description, it is as much as is required. But though it would be good in such a case, yet though it is not requisite to insert the addition, any variance whatsoever, if the party will take upon him to be more than ordinarily particular is fatal; for then the record does not answer the description, as it does where the writ of error makes a total omission of the addition.

Sed per curiam, the cases cited are of variances in the name of the party, which is more considerable than the name of his residence. These words are both properly used, some spell it *abbey* and some spell it *abby*, and if there

there be occasion we take the latter as an abbreviation of the former. *Per curiam*, the record is well removed and the judgment must be affirmed. 1 *Str.* 201, 231, 232. Vide doctor *Drake's ca.* *Ante* 512.

So in the *KING, v. BEACH, Michaelmas, 18 Geo. 3. B. R.* The defendant had been convicted of perjury in an affidavit. Upon shewing cause why the judgment should not be arrested, exception was taken by *Dunning* and *Buller* in support of the rule, that there appeared a material variance between the indictment and the affidavit; for in the affidavit the defendant swore that he "*understood* and believed, &c." whereas the assignment of the perjury in the indictment was, "that he had falsely sworn, that he *undertood* and believed, &c." omitting the letter *f*.

It was insisted that this being a variance in the material part of the charge, namely, in the assignment of the perjury itself, was fatal, and could not be cured by verdict, and cited the *Queen v. Drake. 2 Salk. 660. Ante* 513. *Hutton* 56. *Cro. Jac. 133. 5 Rep. 45. 2 Lord Raym. 1224.*

LORD MANSFIELD. This was an application for a new trial for perjury in an affidavit, upon the ground of a material variance between the affidavit and the indictment, the letter *f* being left out in the word understood: and it comes before the court after the jury have read it "*understood*." We have looked into all the cases upon this subject, some of which go to a great degree of nicety indeed, particularly the case in *Hutton* 56, shaken by the doctrine laid down in 2 *Hawk. ca. 46. 239. 6 Edit. 339.* The true distinction seems to be taken in the case of the *Queen v. Drake, 2 Salk. 660.* which is this, that where the omission or addition of a letter does not change the word, so as to make it *another* word, the variance is not material; in criminal prosecutions a defendant is allowed to take advantage of nicer exceptions: but this is a case where the matter has been fairly tried, and where the omission of the letter *f* certainly does not change the word; therefore the jury were right in reading it understood. *Cowper* 229, 230. 1 *Hawk. P. C.*

7 Edit. 453. *Ante rule 1 and 2. p. 505. Dougl. 193, 194. The King v. May.*

The KING v. Hart is in point. At the lent assizes for the county of *Worcester*, 1776, the defendant was tried for forging a bill of exchange, which was set forth in the indictment, as follows, that is to say :

" No. 215. £. 42 00 00. HULL, April 24, 1775.
" Two months after date please to pay to Mr. Thomas
" Jones, or order, the sum of forty two pounds, value
" received, and place the same to account of

" GEORGE PRINCE"

" Messrs. Halliday & Co. bankers, London."

When the bill was produced in evidence, it appeared that the word "received" was spelt "reciev'd," and it was objected that this variance was fatal ; for although the two words have the *same sound*, yet as the prosecutor had undertaken by the words "as follows, (that is to say)," to recite the bill *secundum tenorem*, he was bound to do it literally and precisely.

It was left to the jury to consider whether they thought the two words imported one and the same thing ; and they found the prisoner guilty : but the judgment was respited for the opinion of the judges.

The JUDGES conceived it to be a proper question for the jury ; for considering it as an abbreviation, yet if it meant only the same word as that used in the indictment, it would not vitiate.

GOULD, J. said, he considered it as the same word, only mis-spelt, and that there was not a possibility of mistaking it for any other word in the English language. *Leach, Cr. Ca. 2 edit. 131. 3 edit. 172.*

Rule the Fifth.

Where it is undertaken to set forth a *public statute*, a mis-recital on the record is fatal.

So in *BOYCE v. WHITAKER Hil. 19 Geo. 3.* This was an action on a bail-bond brought by the plaintiff as assignee of the sheriff of *Kent*. The defendant prayedoyer of the
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the bond and condition, and set forth the condition, which was in the usual form, and then pleaded, that, "before the making of the writing obligatory *afore said*," &c. and set forth the statute of *Hen. 6. c. 9.* and then went on — "which said writing obligatory the said sheriff took by colour of his office against the form of the "statute *afore said*." The act was *mis-recited*, and earl MANSFIELD said, that if the defendant had unnecessarily set out the act of parliament, he would hold him to half a letter; and BULLER, J. added, that there were many cases where the word "*afore said*" had been held to tie the party up to an *exact recital*, and the plea here concluded, that the bond was taken "against the form of the statute *afore said*." *Dougl. 97.*

NOTE—*Douglas*, in a note to his report of the above case says, lord MANSFIELD asked if there was any doubt whether the statute was a public act?

Davenport, as *amicus curie*, said it had been doubted, and was therefore always set out. It is recited in the case of *Lenthall v. Cooke*, and also in *Dive v. Manningham*. *Plow. 60.*

Rule the Sixth.

The COURT can only take notice of *mis-recitals* of *private* acts of parliament, when *nul tiel record* is pleaded; except as to the commencement, prorogations, and sessions.

REX v. WILDE, *Mich. 21 Car. 2.* which was an information under a *private* act of parliament, after verdict for the prosecutor on the plea of "not guilty," a motion was made in arrest of judgment, because there was a mistake in setting forth the commencement of the parliament. The answer given was, that, being a private act, the court could not take notice of the mistake on that motion, as it did not appear on the record, and that the defendant ought to have pleaded *nul tiel record*, but the court held that they were bound to take notice of the commencement, prorogations, and sessions of parliament. 1 *Lev. 206. Dougl. (in notes) 97. Platt v. Hill.*

v. Hull. Mich. 10 Will. 38. 1 Lord Raym. 318. 1 Salk. 330.

IN *TURVILLE v. AYNWORTH. Mich. 1 Geo. 2.* it was determined that a variance in the name of a corporation is fatal. This was an action upon a South-Sea contract, the plaintiff declared it was for stock in the company trading *ad mari Austral' vocat* the South-Sea company.

It was insisted on at the trial, that *Australis* was the proper word without an *i*, and therefore the evidence did not support the declaration: and it was agreed to take a verdict for the plaintiff, and to apply to the court.

After a great debate a new trial was granted; for it was a different corporation; and if the word *Austral'* was to be rejected, it would not do; for then it would be a company trading to all seas, whereas they trade to the South-Seas only; and the *Anglia vocat'*, the South-Sea company will not do where there is a proper Latin word which is not made use of. *James Osborne's ca. 10 Co. 130. 2 Stra. 787, 788. 2 Lord Raym. 1515.*

NOTE—*Douglafs*, in a note to his report of the *King v. May*, puts a query upon the law of the last case, and seems to consider it over-ruled by the *King v. May*, and the *King v. Beach. Cowp. 229. Ante 515. Dougl. 193, 194.*

CHAPTER VIII.

Of Evidence to support an Indictment for Words charged to be spoken by the Defendant: and how such Indictment is affected by variance.

Rule.

IT is no evidence in a criminal case that the defendant said *so and so*, or, words to the like effect, because the court must know the *very words* to judge of their force and effect. *2 Hawk, ca. 46.*

And

And the reason of this rule is, that of words spoken there can be no *tenor*, that is transcript, for there is no original to compare them with, as there is of words written: and though there have been attempts to plead a tenor of words spoken, it has never been allowed. And therefore if a plaintiff declares for words spoken a variance in the omission or addition of a word is not material, and it is sufficient, if so many of the words be proved and found as are in themselves actionable. 12 *Vin. abr.* 68. *pl.* 46.

So in *HUSSEY v. COOKE*, *Easter*, 18 *Jac.* 1. In the *Star-Chamber*. The COURT held that if a witness depose that a defendant did persuade a juror to appear and do him reasonable favour, or words *to the like effect*, this is no sufficient proof in *criminals*, because the court must know the very words to judge of their force and effect. *Hob.* 294. *Fost.* 200. 1 *Hale*, *P. C.* 111, 115, 323. 3 *Kel.* 14.

HALE, COKE, and FOSTER fully justify the principle of this rule. FOSTER says, as to mere words supposed to be treasonable, they differ widely from writings in point of real malignity and proper evidence. They are always liable to great misconstruction from the ignorance or inattention of the hearers, and too often from a motive truly criminal. And therefore I choose to adhere to the rule which hath been laid down on more occasions than one since the revolution, that loose words to any act or design are not overt-acts of treason. *Fost.* 200.

KELYNG says, I see no difference between words *reduced into writing* and words *spoken*. FOSTER answers, the difference appeareth to me to be very great, and lieth here, Seditious writings are permanent things, and if published they scatter the poison far and wide. They are acts of deliberation capable of satisfactory proof, and not ordinarily liable to misconstruction; at least they are submitted to the judgment of the court, naked and undisguised as they come out of the author's hands. Words are transient and fleeting as the wind, the poison they scatter is at the worst confined to the narrow circle of a few hearers; they are frequently the effect

effect of sudden transport, easily misunderstood, and often mis-repeated, *Kelyng* 13. *Foff.* 200.

The suppression of a word or syllable may change the sense. So the change of an emphasis. So words spoken in exclamation conveying by sound and gesture surprise and abhorrence, may be represented in evidence as spoken blasphemously or seditiously.

CHAPTER IX.

Of variance between the circumstances set forth in the indictment, and those given in evidence.

Rule the First.

A VARIANCE between an indictment or appeal of death and the evidence, as to the instrumental cause mentioned in such indictment or appeal, is no ways material, so that the party be proved to have died by the same kind of death as alledged in the indictment or appeal. 2 *Hawk. P. C. ca.* 46. *Hales P. C.* 291. *Gilb. Evid.* 270. 277.

Rule the Second.

Therefore if one be indicted or appealed for killing another with a *sword*, and upon evidence it appear that he killed him with a *staff*, *hatchet*, *bill*, or *hook*, or any other weapon with which a wound may be given, he ought to be found guilty; for the *substance* of the matter is, whether he gave the party a wound of which he died: and it is not material with what weapon he gave it; for the common effectual word is *percussit*, though for form sake it be necessary to set forth a particular weapon. 2 *Hawk. P. C. ca.* 23. *ca.* 46. *Summ.* 265. 2 *Inst.* 319.

Rule the Third.

And on the same ground it hath also been adjudged that, on an indictment or appeal for poisoning a man with one kind of poison, may be maintained by evidence of a different kind of poison; for the substance of the matter is, whether the defendant *did poison* the deceased or not. 2 Hawk. P. C. ca. 46. 3 Inst. 135. 2 Hale. P. C. 291.

Rule the Fourth.

Yet evidence of poisoning, burning, or famishing, or any other kind of killing wherein no weapon is used, will not maintain an indictment or appeal of death by killing with a weapon; and evidence of killing with a weapon will not maintain an indictment or appeal of poisoning, &c. because they are different kinds of deaths. 2 Hawk. P. C. ca. 46. 2 Hale 291. 2 Inst. 319.

The above rules are fully illustrated in two cases.

First, The KING, v. RICHARD WESTON, indicted for murder, *Michaëlmās*, 13 Jac. 1. The defendant, a yeoman of the tower, and servant to sir *Jervais Elwis*, lieutenant of the tower, and, under the lieutenant, the keeper of sir *Thomas Overbury*, then prisoner in the tower, was indicted—For that the said *Richard* on the ninth day of May in the eleventh year of Jac. regis, in the tower of London, gave to the said sir *Thomas Overbury* poison called *roseacre*, in broth, which he the said sir *Thomas* received *et ut idē Richard Weston præfatum Thomas Overbury magis celeriter interficeret et murraret* 1 Junii 11 Jac. regis *supradicti*. gave to him another poison called *white arsenic*, &c. and that 10 Julii Ann. 11. *suprad* gave him a poison called *mercūry sublimatum tarti* ut *prædicti* *Thomas Overbury magis celeriter interficeret et murraret* and that a person unknown, in the presence of the said *Richard Weston*, and by his commandment and procurement the 14th September Ann. 11. *supradicti* gave the said sir *Thomas* a clyster mixed with poison called *mercūry sublimatum* ut *prædictum Thomam magis celeriter interficeret*

*et murraret. Et prædictus Thomas Overbury de sepe-
libus venenis prædictis et operationibus inde, a prædictis sepe-
ralibus temporibus, &c. graviter langlebat usque ad 15
diem Septemb. anno. 11. supradicto, qua die dictus Thomas
de prædictis sepealibus venenis obiit venenatus, &c.* And
albeit, it did not appear of which of the said poisons he
died, yet it was resolved by all the JUDGES of the King's
Bench that the indictment was good; for the substance
of the indictment was, whether he was poisoned or no.
And upon the evidence it appeared that *Weston*, within
the time aforesaid had given unto sir *Thomas Overbury*
divers other poisons as namely, the powder of diamonds,
cantharides, *lapis causticus*, powder of spiders, and *aqua
fortis* in a clyster. And it was resolved by all the said
judges, that albeit these said poisons were not contained
in the indictment, yet the evidence of giving them was
sufficient to maintain the indictment; for the substance
of the indictment was whether he were poisoned or no.
But when the cause of the murder is laid in the indict-
ment to be by poison, no evidence can be given of ano-
ther cause; as by weapon, burning, drowning, or other
cause, because they be distinct and several causes; but
if the murder be laid by one kind of weapon, as by a
sword, dagger, &c. it is sufficient evidence, because they
be all under one class or cause. 3 *Inst.* 49.

Afterwards *Ann Turner*, *Gervase Helwys*, and *Richard
Franklin*, a physician, (purveyor of the poisons) were in-
dicted as accessories before the fact done, and it was re-
solved by all the judges, that either the proofs of the
poisons contained in the indictment, or of any other poi-
son were sufficient to prove them accessories; for the
substance of the indictment against them was, whether
they did procure *Weston* to poison sir *Thomas Overbury*.

So in the KING v. MACKALLY. *Pasc. 9. Jac. 1.* be-
fore all the JUDGES of England, it was resolved, that if
a man be indicted, that he with a dagger gave another
a mortal wound, upon which he died, and it is proved
that he gave the wound with a sword, rapier, staff, or
bill, in that case the defendant ought to be found guilty;
for the substance of the matter is, that the party indict-
ed has given him a mortal wound whereof he died, and
the circumstance of the manner of the weapon is not
material

material in case of indictment; and yet such circumstance ought not to be omitted, but some weapon ought to be mentioned in the indictment. 9 Co. 67.

CHAPTER X.

Of Evidence to support an Indictment against the Principal in a second degree.

Rule the First.

ANTIETNLY he that struck the stroke, whereof the party died, was only the principal, and those that were present, aiding and assisting, were but in the nature of accessaries, and should not be put on their trial, until he that gave the stroke were attaint by outlawry or judgment. 40 Ass. 25. 40 Edw. 2. 42 ca. 1 Hale, P. C. 437.

But at this day, and long since, the law has been taken otherwise, and namely, that all that are present aiding and assisting are equally principals with him that gave the stroke whereof the party died; for though one gave the stroke, yet in the interpretation of the law it is the stroke of every person that was present aiding and assisting, and though they are called principals in the second degree, yet they are principals. 1 Hale, P. C. 437. *Gyltin's case. Plowd. 97. 100.*

FOSTER adds, that in order to render a person an accomplice and a principal in felony, he must be aiding and abetting, or ready to afford assistance if necessary.

Rule the Second.

So when many agree and meet to commit an illegal act, which is perpetrated by one only, all who are present and abetting him, or ready to aid him are principals in the second degree, and are ousted of clergy, as

well as the principal in the first degree. 2 Hawk. P. C. 46. 6 edit. 127. Post. Rule 8.

But in such cases the evidence that constitutes an offender in the second degree is matter of law upon which the court, and not the jury, determines. The King v. Royce. 4 Burr. 2076. Post. 528.

A. B. and C. are indicted for killing J. S. and that A. struck him, and that the others were present, procuring, abetting, &c. and upon the evidence it appears that B. struck, and that A. and C. were present, &c. In this case the indictment is not pursued in the circumstance, and yet it is sufficient to maintain the indictment; for the evidence agrees with the effect of the indictment; and so the variance from the circumstance of the indictment is not material, for it shall be adjudged in law, the wound (*the stroke*) of every one of them, and is as strongly the act of the others as if they all three had held the weapon, &c. and had ~~at~~ together struck the deceased.

all
9 Co. 67. See the principal admitted in *Robert Mary's case*, 9 Co. 112. *b.* and *lord Sanchar's case for murder*. 9 Co. 119. 4 Co. 42. *b.* 11 Co. 5. *b.* 3 Inst. 138. 1 Roll. Rep. 31. 2 Hale, P. C. 292.

FLOWDEN agrees with this rule. In his report of certain points settled at a session held at the town of *Salop*, 1 Mary 1. before BROMLEY, C. J. B. R. FLOWDEN, and others; it was resolved, that when many come to do an act, and one only does it, and the others are present abetting him or ready to aid him in the fact, they are principals to all intents as much as he that does the fact; for the presence of the others is a terror to him that is assaulted, so that he dare not defend himself; for if a man sees his enemy and twenty of his servants coming to assault him, and they all draw their swords and surround him, and one only strikes him, so that he dies thereof, now the others shall with good reason be adjudged as great offenders as he that struck him; for if they had not been present he might probably have defended himself, and so have escaped: but the number of the others being present, and ready to strike him also, shall be adjudged a great terror to him, so as to make him

him lose his courage, and despair of defending himself, and by this means they are the occasion of his death. So that their presence is the cause of terror, and terror is the reason that he receives the wounds, and the wounds are the cause of his death. And then in as much as both together, viz. the wounds and the presence of the others who gave no wounds at all are adjudged the cause of his death, it follows that all of them, viz. those that strike, and the rest that are present, are in equal degree and each partakers of the deed of the other. And notwithstanding there is but one wound given by one only, yet it shall be adjudged in law the wound of every one, that is, it shall be looked upon as given by him who gave it by himself, and given by the rest, by him, as their minister and instrument. And it is as much the deed of the others as if they had all jointly holden with their hands the instrument with which the wound was given, and as if they had ~~all~~ together struck the person that was killed. So that it cannot be well termed that they that gave the wound are principals in deed, and the others principals in law; but they are all principals indeed, and in the same degree. 1 *Plowd. Comm.* 98. all

Rule the Third.

Where the indictment is on a statute, the same rules apply as where the indictment is at common law.

As in the COAL-HEAVERS case. *Old-Bailey, July sessions, 1768*, before PARKER, C. B. ASTON, J. B. R. and GOULD, J. C. B.

John Granger, Daniel Clarke, Richard Cornwall, and four others were indicted on the *black-act*, for that they "with certain guns charged with gun-powder and leaden bullets, did wilfully and maliciously shoot at one *John Green* (in his dwelling-house) against the *statute* and "against the peace."

Four of the prisoners were *proved* to have fired at *Green*, through the windows of his house; and the marks of a great number of balls were afterwards found in different parts of the room. The other three prisoners were proved to have been *present* when the others fired, but

but they were not seen to use any fire-arms themselves.

The JURY found all the prisoners guilty; but a question was reserved for the opinion of the judges, whether those who were only present aiding and abetting were involved in the same guilt with those who actually fired; the statute upon which the indictment was framed being silent as to aiders and abettors.

The JUDGES determined that this offence was a new-created felony, and therefore that it must possess all the incidents which appertain to felony by the rules and principles of the common law. 19 *Hen. 6.* 47. *Staunf.* 44. 3 *Inst.* 45. 1 *Hale*, 613. 2 *Hawk.* 444. 6 *edit.* *Fost.* 354. *Leach. Cr. Ca.* 3 *edit.* 76.

The statute does not merely take away the privilege of clergy from an offence which was before known, but it ordains that those who were before guilty of the thing prohibited by it shall be adjudged felons, without benefit of clergy; and therefore, by a necessary implication, makes all the procurers and abettors of it principals or accessories upon evidence of the same circumstances which will make them such in a felony by the common law; and it hath been long settled, that, all those who are present aiding and abetting when a felony is committed, are principals in the second degree. *Coal-beavers case*, *Leach. Cr. Ca.* 3 *edit.* 78.

So in the *KING v. MIDWINTER and SIMMS. Gloucester Lent assizes*, 1749. Indicted on *stat. 9 Geo. 1. ca. 22.* for unlawfully, maliciously, and feloniously killing a mare, the property of *James Lenox Dutton*. On evidence it appeared that *Simms* held the mare while *Midwinter* with a sharp hook gave her a mortal wound in the belly, held by all the judges, except *Foster*, that *Simms* was debarred the benefit of clergy. *Leach. Cr. Ca.* 3 *edit.* 78. 4 *Burr.* 2075.

Rule the Fourth.

In a special verdict a jury are not to find evidence but facts; the evidence is with the court.

Rule

Rule the Fifth.

A special verdict which only finds that the defendant was *present* at the perpetration of the charge laid in the indictment, but does not find any particular act of *force* committed by him, is not sufficient to warrant the court to decide that there is *evidence* to convict the defendant as a principal in the second degree.

Rule the Sixth.

If a jury expressly find that the defendant *encouraged* and *abetted* the principals in the first degree in doing the criminal act charged in the indictment, and also *how* he abetted and encouraged them, and the particular circumstances of his doing so; and these circumstances amount to evidence of abetting: they are in point of law *evidence* sufficient to prove him a principal in the second degree.

Rule the Seventh.

And the above rule holds good, though the jury should also find that he did *not* use any force, or do any act, personally; and then the word *aiding* should not be in the special verdict.

In the KING v. MESSENGER, APPLETREE, and others, indicted for high treason. *Old-Bailey sessions, June, 20 Car. 2.* Special verdicts were found, and the judges resolved—

First, That where there are acts of *force* found to be actually committed by the defendant in pursuance of the design, there is no need to find him to be *aiding* and *assisting*, which is only necessary to be found where *presence* without *force* is found.

Secondly, That a verdict is not full enough for the judges to decide on against the defendant where it only finds that he was *present*, and finds no particular *force* or that he was *aiding* or *assisting* to the rest; for it is possible one may be present amongst a rabble only out of curiosity to see, and whether they were aiding and assisting

is matter of fact which ought to be expressly found by the jury, and not to be left to the judges upon any colourable implication. *Kelying*, 77 to 79. 2 St. Tr. 591.

These rules are also illustrated in the *KING v. JOHN ROYCE*, *Easter*, 7 Geo. 3. B. R. The defendant was indicted for a capital felony, as a principal in the second degree at a special commission at *Norwich*, *September*, 6 Geo. 3. on stat. 1 Geo. stat. 2. c. 5. for feloniously beginning to demolish and pull down a dwelling-house the property of *Robert Marlb*, &c. against the statute.

The special verdict stated, that at the time the said persons *unknown* so began to demolish the said dwelling-house, the said *John Royce* was then and there *present*, and did then and there *encourage and abet* the said persons unknown in beginning to demolish and pull down the said dwelling-house, by then and there *shouting* and using *expressions* to excite the said persons so to do. But the jury further find that the said *John Royce* did *not* with force begin to demolish or pull down, or *do any act* with his own hands or person, for that purpose, otherwise than as aforesaid.

NOTE—The word "*aiding*" was originally inserted in the special verdict; but struck out by *Gould, J.* who tried the cause.

The question was whether (upon facts stated in the special verdict, and which of course had been given in evidence on the trial) he was a principal in the second degree, and as such ousted of clergy by the statute.

Solicitor General Willes, pro Rege, among many other cases cited the case of the *rioters* at *Sissinghurst*, in *Kent*; wherein it was determined that those *within* a house, if they abetted or counselled a riot, were in law present aiding and assisting, and *principals*, as well as those that *issued out* and actually committed the assault; for it was but within five rod of the house, and in view thereof, and all done as it were in the same instant. 1 *Hale, P. C.* 463.

Upon the present finding this man is a principal in the second degree. *Accessaries at the fact*, as they were anciently called, are now considered as principals in the
second

second degree. These are defined i *Hale*; P. C. 437. 616. *Foster*. 350. *Antt* 527.

This man was abetting and ready to afford assistance. The negative part of the finding only shews that he was not a principal in the *first* degree. Enough is found to shew that he was so in the *second*. For though aiders and abettors are not particularly named in this act of parliament, yet there is enough in it to shew that they were *meant* to be included in it; and the benefit of clergy is taken from them by it "the offenders therein shall be " adjudged felons, and shall suffer death as in case of " felony, without benefit of clergy."

Wallace, for the defendant, urged—*First*, that this statute is restrained to those who actually commit the felony. *Secondly*, that this finding does now draw the defendant within the description of a principal felon in the second degree. And he cited *Hale*, who lays it down that where any statute subsequent to 25 *Edw.* 3. c. 4. hath ousted clergy; in any of those felonies, it is only so far ousted, and only in such cases and to such persons as are expressly comprised within such statutes; for, in *favorem vite et privilegii clericalis* such statutes are construed literally and strictly. 2 *Hale*. P. C. 335.

Now this man did not actually *assist*; he only encouraged by expressions to incite. It does not appear even that he was *ready* to assist them in *act*: and it is found negatively that he did *not* do any act, &c. with his own hands or person.

Lord MANSFIELD recommended inquiry to be made for precedents of cases where the word "*aiding*" was omitted in a special verdict. He observed, the word "*aiding*" does not necessarily imply that the person *actually* did any thing. The mere *presence* may be an aiding, as in taking prizes at sea. The number of persons present and inciting *deters* others from opposing; though the persons present and inciting may not do any particular and personal act themselves.

Lord MANSFIELD said, there was no doubt but that principals in the first and principals in the *second* degree were all equally felons without benefit of clergy.

The act says: "every such demolishing, or pulling down, or beginning to demolish or pull down, shall be adjudged felony without benefit of clergy; and the offenders therein shall be adjudged felons, and shall suffer death as in cases of felony, without benefit of clergy."

But it leaves the evidence to law, and by law they are all equally actors.

The being principal in the *first*, or principal in the *second* degree relates to the priority of trial.

So there is no doubt on the act but that all are guilty, the aiders as well as those who perpetrate the act.

The acts that take away clergy turn upon another point, viz. whether they meant to distinguish the offenders, and single out some as being under more aggravating circumstances than others, and deserving more punishment than the rest: as in cases of rape, buggery, and other common-law offences.

So on the statute stabbing, upon which the *King v. Page* and *Harwood* was determined. I have no doubt but that the intention of the statute was to distinguish the persons who actually gave the stab. His case differs from the rest in point of aggravation. *Stat. Jac. 1. ca. 8. Irish. 7 Will. 3. ca. 11. 3 Stat. at large, 278. Post.*

The Pick-pocket act is colourable: not so strong nor so clear as that of stabbing: that may be liable to doubt, "*clam et secreta*," suppose the person might not be privy to the private manner of doing it? 8 *Eliz. ca. 4. sec. 2.*

In case of robbery in a house, there was great reason for *Powell's* and *Hawkins's* doubt, and the legislature thought it necessary to make a new act. Vide *Evans's* and *Finch's* case, *Cro. Car. 473, upon the 39 Eliz. ca. 15. 2 Hawk. P. C. 355. 6 edit. 498.*

But in the black-act the words are, "if any person, &c. shall unlawfully and maliciously kill, maim, or wound any cattle, &c. every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy." And yet in the aforementioned case of *Simms*, Mr. justice *Foster* had a doubt,

doubt, whether the statute did not confine the offence to the *person killing*: but the other eleven judges held the other to be as criminal; and that determination was right. *Ante* 527.

But though we are all clear, "that principals in the second degree are indictable as principals," yet we have great doubt on this special verdict as to the particular finding, or indeed whether it finds any thing material at all.

The jury cannot find *evidence*, they must find *facts*.

In the case of *Messenger*, and others, it was agreed that a finding of *all evidence*, and no fact, was not sufficient; that being *aiding* and *assisting* is matter of fact, and ought to be found by the jury, and that a verdict which only finds, "that the defendant was *present*," but finds no particular act of force committed by him, is not full enough for the court to judge upon. *Kelyng*, 78, 79. *Ante* 527.

This special verdict has found nothing more than being aiding and assisting. What the jury specially finds is, that he did then and there encourage and "abet by *shouting* and using *expressions* to incite; and not otherwise; not with *force* or by any personal act." They do not find him *ready to assist*: nor do they use any words to find him *aiding* and *assisting*, which are the necessary words to be inserted in a verdict to charge offenders as principals in the second degree. Therefore let it be spoken to, when the question, *WHAT is found by this special verdict*.

ASTON, J. They might have found him to have been aiding and assisting, or at least, ready to assist. *Hale* and *Harokins*, and all the writers upon the subject, and lord *Coke* in particular, speak of being present, aiding and assisting. Therefore aiding and assisting, ought to be expressly found. We ought not to depart from that precision which is required.

HEWIT, J. concurred.

SECOND ARGUMENT.

The *Attorney General* concluded that the special verdict was sufficiently expressed to affect the prisoner with the crime charged upon him. He is expressly found to have been present, and to have encouraged and abetted.

In 2 *Inst.* 182. lord Coke in his comments on *Westm. i. ca. 14.* explains the words command, force, *aide*, and rescitment: and in speaking of the word "*aid*," he says, it comprehends all persons counselling, *abetting*, plotting, assenting, *consenting*, and *encouraging* to do the act, and who are *not present when the act is done*; for if the party commanding, furnishing with weapon, or aiding, be present when the fact is done, then he is a principal.

In the case of murder—If *A* commands *B* to beat *C*. and he beats him so that he die thereof, it is murder in *B*. and *A*. if present, is also guilty of the offence. 1 *Hale*, P. C. 435. 440. *Pult.* 137. *a.*

If any one comes for an unlawful purpose, &c. though he do not act, he is yet a principal. 1 *Hale's P. C.* 374. 443. 2 *Hawk.* 311.

LORD MANSFIELD. Your principles are admitted. But the question here is, "Whether he did more than "use expressions to incite." We are quite clear with you, that what you mention is evidence, from whence a jury might have drawn conclusions; but here the word "*aiding*" is left out, which seems to be the technical term. And the finding of the abetting is qualified, for it is found negatively, that he did it "no otherwise "than by shouting and using expressions to incite."

HEWITT, J. The objection is, that it is not expressly found "that he *did* aid or assist:" nor is any force shewn to have been used by him; but the contrary, "that he "did not use force, or *do* any act with his own hands, "&c."

Attorney-general. *Aiding* is not necessary nor *assisting*. *Abetting* indeed is necessary: but *consent* alone is sufficient in the present case. Here was strong instigation, by actual shouting and using expressions to incite: and it is expressly found, that he did "*encourage and abet*."

Minsheu, and *Cowell* and *Skinner*, *verbo* "*abet*;" and *Spelman* and *Du Fresne*, all shew that instigation alone without force, is the sense of the word "*abet*;" and that is always taken in this worst sense.

Seconds to duellists are principals in the second degree or not, according to the different designs they come upon. 1 *Hale's P. C.* 443, 444.

"*Nulhus dicitur felo principalis, nisi actor, aut qui præsens est abettans, aut auxilians actorem ad feloniam faciendam.*" 3 *Inst.* 138. And *Foster* says, "persons engaged, &c." "will not be involved, unless they actually aided and abetted." It is the mind, not the act that constitutes the offence. *Foster* 354.

A servant assisting his master, but not privy to the master's intention, if the person against whom he assists him is killed, it is murder in the master, because he had malice aforethought; but only homicide in the servant. 1 *Hale P. C.* 437, 438.

In *Messenger's* case *Green* was holden not guilty, because no particular act of force was found against him, nor that he was aiding or assisting the rest. So *Appletree's* case and *Bedell's* case, nothing was found that sufficiently charged them. 2 *St. Tr.* 591. *Ante* 527.

Indeed, it is necessary to find either force or something contributing to the guilt. But here is the latter; this was an illegal assembly; the defendant abetted and encouraged by shouts and expressions: the mode of his abetting is found; and contributing to the guilt is implied in the very idea of abetting. The result is of course. The using expressions to excite, comes up to lord *Hale's* notion of abetting.

Special verdicts need not be so nice and strict as either indictments or appeals.

Cox, for the defendants. The present case depends upon the distinction between *aiders* and mere *abettors*. In the cases that have been cited, where the defendant both aided and abetted, the distinction was not necessary to be attended to. This man cannot be considered a principal in the second degree. This felony is not *malum in se*. It was originally a trespass, and only made felony by act of parliament.

In much higher offences, such as stabbing a person not guilty of a sufficient proportion of guilt, shall not be a principal in the second degree.

Every

Every thing shall be taken most favourably for the prisoner. This is always laid down and particularly so in *Regina v. Whistler*, and others. 2 *Lord Raym.* 842.

This offence is little more than a trespass. The man did nothing; it does not even appear that the expressions of incitation were heard by the perpetrators of the fact. They ought to have shown, that the mischief was done in consequence of these expressions of incitation. *Aiding and assisting* ought to have been expressly found. Abetting is only encouraging; it may be innocent, for it may be without effect. *Aiding* indeed cannot be innocent; but *abetting* may.

The *King v. Page and Harwood*, is exactly similar to this case. The defendants in that case were only present and abetting the person that did the fact, but used no action towards the death of the party, and they were admitted to their clergy.

In the case of *Messenger*, and others, the *aiding and assisting* were holden to be essentially requisite to be expressly found as a fact. *Green and Bedell* were discharged, because they were not expressly found to be *aiding and assisting*. *Ante* 527.

Abetting is less than *aiding and assisting*. The latter is a fact which ought to have been expressly found by the jury, in order to make this man a principal in the second degree: and no such fact having been found against him, he ought to be discharged.

The *Attorney-general* said, that as Mr. *Cox* had not put it upon any new foot he would not reply.

LORD MANSFIELD. The question intended to be left to the opinion of the court upon this special verdict was, "whether persons present, aiding and abetting the others unknown, in beginning to demolish and pull down the dwelling-house, who are all principals in the second degree, were within this statute."

And we are all of us of opinion that they were: and we are all very well satisfied that we were right in our opinion.

But then a question was started, "whether the fact of *aiding and assisting* was at all found by this special verdict,

"verdict, as it is worded; the words of it going no further than *encouraging and abetting*."

The doubt arose on what is said in the case of *Messenger* and others; and whether the objections that prevailed in those cases to the want of fulness and sufficiency in the verdict might not prevail in this.

And a doubt particularly arose on the omission of expressly adding the word "*aiding*;" for though the evidence which the jury states in the special verdict were admitted to be sufficient to support such a finding, if they had gone on to draw the conclusion, yet this was said to be no more than a finding of mere evidence, without drawing a conclusion from it.

And it was said, too, that even the finding "his being present encouraging and abetting, by shouting and using expressions to incite," was qualified by the negative finding which follows it, "that he did not with force begin to demolish or pull down, or do any act with his own hands or person for that purpose, *otherwise than as aforesaid*."

Tenderness ought always to prevail in criminal cases, so far at least as to take care that a man may not suffer otherwise than by due course of law; nor have any hardship done him, or severity exercised upon him, where the construction may admit of a reasonable doubt or difficulty.

But tenderness does not require such a construction of words (perhaps not absolutely and perfectly clear and express) as would tend to render the law nugatory and ineffectual, and destroy or evade the very end and intention of it: nor does it require of us that we should give into such nice and strained critical objections as are contrary to the true meaning and spirit of it. But, however, there being a doubt raised upon this special verdict, we have considered it, and taken time to form our opinion and determination upon the validity of the objection.

And we are all of opinion, that the verdict is *sufficient* to find this man a principal in the second degree.

Aiding is an equivocal term: but *abetting* certainly makes him a principal in the second degree. It is true, the word "*aided*" is not specially used in this special verdict:

verdict: but it is found "that he was present and did
 " then and there encourage and abet, by shouting and
 " using expressions to incite." The jury have positively
 found the conclusion, "that he *did* encourage and abet."
 They have also found *how* he encouraged and abetted,
viz. "by then and there shouting and using expressions
 * to incite the persons to do the act," but this latter
 finding *cannot vitiate* their former conclusion, "that he
 " did then and there encourage and abet."

It is objected, that this is not the *whole* of what they
 find, for they find further, "that he did *no act* with his
 " own hands or person for that purpose, otherwise than
 " as aforesaid." And it is true, that they have so gone
 on and added this further finding. But it is also as true
 that they have found, "that he was then and there pre-
 " sent, and did then and there encourage and abet the
 " said persons unknown, in beginning to demolish and
 " pull down the said dwelling house, by then and there
 " shouting and using expressions to incite the said per-
 " sons unknown so to do."

The jury have expressly found, that he encouraged
 and abetted the offenders, in doing the criminal act men-
 tioned in the indictment: they have found *how* he en-
 couraged and abetted them: and have specified the par-
 ticular circumstances of his doing so, and these circum-
 stances amount to *evidence* of it: they are in point of
 law evidence sufficient to prove "that he did encourage
 " and abet them."

Therefore there lies no objection in point of form to
 the special verdict:

He was present encouraging and abetting persons un-
 known, to the number of one hundred and more, with
 force and arms unlawfully, riotously, and tumultuously,
 assembled together, to the disturbance of the public peace,
 in feloniously with force and force, unlawfully, and with
 force beginning to demolish and pull down a dwelling
 house: and therefore *he is a principal in the second degree.*
 4 Burr. 2073, to 2084.

Rule the Eighth.

Aiders and abettors in an illegal act are not answerable for a homicide, unless it appears upon *evidence* to the jury, or by facts stated to the court in a special verdict, that the homicide was committed in pursuance of an illegal act; and in that case they are principals in the second degree.

As in the *KING v. PLUMMER, Hilary, 13 Will. 3. B. R.* Special verdict. The case was one of a party of smugglers being pursued by officers, fired off his fusée and killed one of his own gang. Question, Was this murder?

HOLT, C. J. Suppose it had been found by the jury, that the man who discharged the fusée did it of malice prepense, and thereby one of his own gang is killed, it could not affect any of the rest, for though they are all engaged in an unlawful act, and that by the act of one a man is killed, it will be murder in the other, though he has done nothing, yet his being originally engaged in the unlawful act it makes him guilty of murder. But this has several qualifications.

First, to make one an abettor in such a case it is necessary he should know of the malicious design; that is that it was unlawful, for if he be ignorant of the design, though he be engaged in the unlawful act, foreign from the design, he shall not be guilty of murder: for it would be hard to make a man an abettor to a collateral act, to the malice whereof he was no way privy. *Hale, Tit. Mur. pl. 101. Crompt. 23.*

He then quoted a case which happened upon *evidence*. *Old-Bailey, December, 1664.* The secretary of state made his warrant to apprehend suspected persons, directed to the messengers. The messengers having notice of their being in a house, took several soldiers with them to apprehend the persons, but took no civil officer, neither did they make any demand to have the door open, as they ought by law to do, but broke open the door, when some of the soldiers fell a plundering and stole away some goods. The question was, whether this was felony in them all. That they were all engaged in an unlawful act is plain, for they could not justify breaking a man's house without making demand first, and in that

case all those who were not privy to the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door; and the reason was, because they knew not of any such intent, but it was a chance opportunity of stealing. 12 *Mod.* 628, 629, 630. 1 *Kielw.* 109. S. C. *Kielw.* 66, 67. 8 *Mod.* 1615. *Anonymous.*

So in the *KING, v. HONGSON*, and others, *Old-Bailey*, 1730. This was a special verdict, found on an indictment for *murder*, to the following effect.

The prisoners, together with several others, were hired by one O. S. to assist him in carrying away his household furniture, in order to avoid its being distrained for rent. They accordingly assembled for this purpose, armed with bludgeons and other offensive weapons. The landlord of the house, accompanied on his part by another set of men, came to prevent the removal of the goods, and a violent affray ensued. The constable was called in and he produced his authority, but could not induce them to disperse. While they were fighting in the street, one of the company, to the jurors unknown, killed a boy who was standing at his father's door looking on, but totally unconcerned in the affray.

The question was, whether those facts amounted to evidence of wilful murder in all.

The point was submitted to the JUDGES in the shape of a reserved case.

The two CHIEF JUSTICES were of opinion, that the evidence amounted to murder in all the company, because they were all engaged in an unlawful act, by proceeding in an affray after the constable had interposed and commanded them to keep the peace, especially as the manner in which they originally assembled, *viz.* with offensive weapons and in a riotous manner, was contrary to law, though the purpose for which they assembled, *viz.* to carry away the goods was justifiable, and to shew that where divers go to commit a *disseisin*, and one of them kill a man, the rest are principal felons, they cited *Stamf.* 17, 40. *Fitzherb. Cor.* 350. *Crompt.* 244. *Ante, Rule 1.*

But

But the majority of the JUDGES held, that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not affect the rest, for the homicide did not happen in prosecution of the illegal act, and therefore the persons, though constructively present, could not be said to be aiding and abetting the death of one who was totally unconcerned in the design for which the parties had assembled. Vide the antecedent authorities in this chapter, and *Kely*: 70.

And they cited *Plummer's case*. 12 *Mod.* 629. And two cases before HOLT, C. J. the one at *Hereford*, the other at *Sarum assizes*, both of which are mentioned by *Foster*, 353. *Ante* 537.

And in the *KING v. BROTHWICKS*, and others. *Trinity*, 9 *Geo. 3. B. R.* It was held, that on an indictment for murder, if the jury find a special verdict, it is necessary in order to affect principals in the second degree, to state either *first*, that they were actually present; or *secondly*, some acts done by them at the very time, which unavoidably shew that they were present; or *thirdly*, that they were of the same party, on the same pursuits, and under the same engagements and expectations of mutual defence and support, with the person who did the fact. *Dougl.* 207. *Irish edit.* 202.

CHAPTER XI.

How far the Doctrine respecting Variance affect the Accessory or Abettor.

Rule the First.

WHEREVER a variance between an indictment or appeal, and the evidence brought to support them is material or immaterial in respect to the *principal*, it will be material or immaterial in respect to the *accessory*. 2 *Hawk. P. C.* 46.

Therefore if A. B. and C. be indicted for the murder of D. and it is laid in the indictment that A. gave him the stroke whereof he died, and that B. and C. were *presentes, auxilantes et abettantes*, though upon the evidence it appears that B. alone gave the stroke whereof he died, and that A. and C. were *presentes*, &c. it maintains the indictment. *Mackally. 9 Co. 65. Cro. Jac. 279. Ante 522. 2 Hale P. C. 292.*

If A. and B. be indicted for the murder of C. and upon the evidence it appears that A. committed the fact, and B. was *not* present, but was accessary before the fact, by commanding it, B. shall be discharged. *26 Hen. 5. 2 Hale P. C. 292.*

If A. and B. be indicted as principals, and B. is indicted as accessary, and C. is indicted as accessary to both after the fact done, A. and C. are convicted, or only A. is convicted, and upon the evidence it appears he was only accessary to A. it maintains the indictment. *Lord Sanchar's ca. 9 Co. 119. Ante 2 Hale P. C. 292. 3 Inst. 165.*

Rule the Second.

It is settled at this day, though there were anciently some opinions to the contrary, that if an indictment or appeal against A. B. and C. for the death of D. charge A. as giving the mortal blow, and B. and C. as being present procuring and abetting, and the evidence prove that B. and C. gave the blow, and that A. was only present procuring and abetting, yet it maintains the indictment, because in the judgment of law, the act of *any* of them is the act of all. *2 Hawk. P. C. ca. 46. and ca. 29. sec. 7. to the same point. Also ca. 23. sec. 76. 1 Hawk. P. C. ca. 32. sec. 6. ca. 31. sec. 31. 50. ca. 34. sec. 7. ca. 38. sec. 89. ca. 41. sec. 6. Gilb. Evid. by Loft 860. Mackally's ca. 9 Co. 67. Bro. Appeal. 85 Corone. 1 Hale P. C. 437, 438. Plowd. Comm. 98. a.*

The KING v. WALLIS, and others, *Old-Bailey sessions, October 1763*, was determined on the above rule. Indictment against A. for the murder of *John Cooper*; and also against B. C. D. and E. as persons present, assisting, aiding

aiding and abetting *A.* therein. *A.* being arraigned upoff this indictment, pleaded not guilty, and upon evidence it appeared that the person slain was a constable, and in the execution of his office, with divers other constables, in *May-Fair*. That *A.* the prisoner, first drew his sword; and with divers others, to the amount of fifty persons, fell upon the constables. That this affray continued an hour after until in the end one of the constables, viz. the said *John Cooper*, was slain; but by whose hand it did not appear. It also appeared that *A.* had been acquitted.

Et per HOLT, C. J. *First*, Though the indictment be against the prisoner for aiding, assisting, and abetting *A.* who was acquitted; yet the indictment and trial of this prisoner is well enough; for who actually did the murder is not material; the matter is that a murder was committed, and the other is but a circumstance, and all are principals in this case; therefore if a murder be proved, it is well enough.

Secondly, if a man begins a riot, as in this case, and the same riot continue, and an officer is killed, he that began the riot as the prisoner did, is a principal murderer, though he did not do the fact. *i Salk.* 334, 335.

So in *BANSON v. OFFLEY*. This was an appeal of murder tried in *Cambridgehire* against three persons, and the count was, that *Offley* did assault the husband of the appellant, and wounded him in *Huntingdonshire*, of which wound he did languish and die in *Cambridgehire*, and that *Lippon* and *Martin* were assisting.

The JURY found a special verdict, in which the fact appeared to be that *Lippon* gave the wound, and that *Martin* and *Offley* were assisting.

The first exception to this verdict was, that the count and the matter therein must be certain, and so likewise must the verdict, otherwise no judgment can be given; but here the verdict finding that *another* person gave the stroke, and not that person against whom the appellants had declared it is directly against her own shewing. But,

The COURT answered to this exception, that it was of no force, and that same objection may be made to an indictment; whereas in an indictment, if one gives the stroke,

stroke, and another is abetting, they are both principally and equally guilty; and an indictment ought to be as certain as a count in an appeal. 3 *Mod. Rep.* 121. *Cases Temp. An.* 70. *Vide Wilson v. Law.* 1 lord Raym. 21, 22; and *the King v. Brathwick.* Dougl. 210. *Ante*

Rule the Third.

If one be indicted as accessory to two, and upon evidence appear to have been accessory to one of them only, yet he shall be found guilty. 2 *Hawk. P. C. ca.* 46. *Vide also same book, ca.* 29. *sec.* 46, 47. 2 *Hale, P. C.* 292. 40 *Affiz.* 25 *Coron.* 263. 7 *Hen.* 4. 36. b.

As in lord SANCHAR's case, *Trin.* 10 *Jac.* 1. The same rule is laid down in these words: Indictments which concern the life of men ought to be framed as near the truth as may *et eo potius*, because they are to be found by the oath of the grand inquest, which finding is called *verdictum quasi dictum veritatis*, and yet it was resolved, that if one is indicted as accessory to two, and he is found accessory to one, the verdict is good. 9 *Co.* 119. 2 *Inst.* 183. 1 *Hale, P. C.* 624.

But it is holden by sir EDWARD COKE, that if an appeal be brought against two as principals, and against another as accessory to one of them, and one of those charged as principals be found not guilty, the accessory is discharged; for which he gives this reason, that because the plaintiff made him accessory to two, he cannot be found accessory to one. 2 *Inst.* 183.

HAWKINS observes, that no authority is cited for the maintenance of this opinion, neither doth it seem easy to reconcile it with the resolution above mentioned in lord Sanchar's case, unless the rules of evidence on an appeal differ from those on an indictment which they do not as to other variances. 2 *Hawk. P. C. ca.* 46. *Vide in the same ca. sec.* 32, 34, 37, 38, 39. *quibus virga erecta adfit, et emissio seminis ex quodam defectu desit.*

CHAPTER XII.

Of Evidence to support an Indictment for high treason, on stat. 25 Edw. 3. stat. 5. ca. 2. and the statutes against Coining.

Rule the First.

EVERY species of evidence which the *common law* allows to be received on prosecutions for felonies is admissible against and for prisoners charged with high treason, but in *England* there are many exceptions by statute. Vide *ca.* 5. *Ante* 15. *ca.* 6. *Ante* 37. *Ca.* 16. 160. *Conspiracy, ca.* . and for particular points *vide the Index.*

Rule the Second.

On an indictment for compassing and imagining the death of the king, *words* being the most natural way of expressing the imagination of the heart, are considered as evidence of such imagination. 1 *Hawk. P. C. ca.* 17. *sec.* 38. *Fost.* 202, 203.

Therefore commands and persuasions to commit treason are evidence to convict the party commanding and persuading; for by such means he would be accessory to a felony, and it is an uncontroverted rule, that whatever facts will make a man accessory in felony will make him principal in treason, and yet he does act but by words. 1 *Hawk. P. C. ca.* 17. *sec.* 39.

There is a plain distinction between *overt-acts* and evidence. *Overt-acts* do undoubtedly discover the man's intentions, but they are not to be considered merely as matter of evidence, but as the means made use of to effectuate the purposes of the heart. With regard to homicide, while the rule *voluntas pro facto* prevailed, the *overt-acts* of compassing were so considered. And though in the case of the king *overt-acts* of less malignity and having a more remote tendency to his destruction, are, with great propriety, deemed treasonable; yet still they are considered

sidered as means to effectuate, not barely as *evidence* of the treasonable purpose. Upon this principle *words* of advice or encouragement, and above all consultations for destroying the king, very properly come under the notion of *means made use of* for that purpose. But *loose words* not relative to facts are, at the worst, no more than bare indications of the malignity of the heart. *Ante*.

Rule the Third.

On indictment on 8 & 9 *Will. 3. ca. 26.* enacted against making or mending instruments for coining. Every thing necessary to shew that the defendant is not within the exceptions must be negatively averred; but it is not necessary for the prosecutor strictly to *prove* these negative facts, for it is incumbent on the defendant to prove the affirmative. 1 *Hawk. P. C. 7 edit. 101. 1 Burr. 148. The King v. Maurice Jervis. 2 Bur. 1037. The King v. Pemberton. Addington's P. L. 149.*

Rule the Fourth.

To convict a prisoner on the above statute, it must appear in evidence that the counterfeit money found in his custody was passable, and that the prisoner was possessed of all the implements and ingredients necessary to make such counterfeit money.

As in the *KING, v. HARRIS and MINION*, determined at Serjeant's-Inn-Hall by the judges, *Hilary, 1776*, on a case reserved by *ASHURST, J.* at the preceding sessions, *Old-Bailey.*

It was an indictment of two counts for high treason in counterfeiting the coin. The first was framed upon *stat. 25 Edw. 3. ca. 2.* and charged the prisoners with having "coined and counterfeited one piece of the money of this realm called a shilling." The second was founded on *stat. 8 & 9 Will. 3.* and charged them with having "coined one piece of false, feigned, and counterfeit money and coin to the likeness and similitude of the good, legal, and current money and silver coin of this realm called a shilling, against the duty of their allegiance," &c.

The

The evidence was—that when the prisoners were apprehended, *Minion* was sitting by the fire, and *Harris* had a scissars and metal in his hand, which he was clipping into slips more than an inch broad. There was a crucible on the fire and metal melting in it, scales and weights, and gold and silver lying by them; as also flasks and moulds, and pieces of base metal, which appeared to have been cast in the moulds, the impression upon them exactly resembling that on one of the good shillings which lay near them. But no piece of base metal found was in such a state as to make it passable.

ASHURST, J. Thought the first count in this indictment new and singular; and it was now introduced for the first time. In two recent instances where the indictment consisted of one count only similar to the second in the present indictment, the jury, upon evidence like the present, had been directed to acquit the prisoners. In his idea, the different formation of the indictment could not vary the offence, and he directed the jury to acquit the prisoner.

The jury found the prisoners *guilty* on the first, but acquitted them on the second. The question submitted to the judges was, whether under these circumstances the conviction was proper, and they were unanimously of opinion that it was not. *Leach. Cr. Ca. 3 edit. 163.*

Rule the Fifth.

Evidence of making a round blank, like the smooth shillings in circulation, the original impression of which has been effaced by wear, will support an indictment charging that the prisoner, one piece of false, feigned, and counterfeit money and coin to the likeness and similitude to the good, legal, and current coin of this realm, called a shilling, falsely and deceitfully, feloniously and traitorously did forge, counterfeit, and coin, &c.

So ruled in the KING, v. SAMUEL WILSON, *Old-Bailey sessions, 1783.* by EYRE, B. and the prisoner was convicted and executed. *Leach, Cr. Ca. 3 edit. 320, and MS. note.*

Rule the Sixth.

But evidence of forging the impression of the current coin on a piece of metal so irregularly, that it will not pass in currency, will not support an indictment for high treason: for the crime is incomplete.

So ruled in the KING, *v.* VARLEY, by the judges on a question reserved at *York assizes*, 1771, by GOULD, J. 2 *Blackf. Rep.* 682. *Leach. Cr. Ca.* 3 edit. 89. S. C.

Rule the Seventh.

A conviction of high treason may be upon the evidence of *one* witness in all cases where there is no corruption of blood. *Vide the illustrations of this rule. Ante 35.*

CHAPTER XIII.

Of Malice.

THE legal doctrine of malice contains the preliminary rules on which every question arising from homicide is decided; they have been laid down by *Foster* with his usual perspicuity and judgment, and are now universally received by the judges of the land as authorities.

Rule the First.

In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be proved by the *prisoner*, unless they arise out of the evidence produced against him: for the law presumeth the fact to be founded in malice until the contrary appeareth. *Fost.* 256.

And right it is the law should so presume. The defendant in this instant standeth just upon the same foot

foot that every other defendant doth; and the matters tending to justify, excuse, or alleviate must appear in evidence before he can avail himself of them. *Ibid.* 1 Hale, P. C. from 451 to 454.

Rule the Second.

In every case where the point turneth upon the question whether the homicide was committed wilfully, or maliciously, or under circumstances justifying, excusing, or alleviating the *matter of fact*; that is to say, whether the facts alledged by way of justification, excuse, or alleviation are true, is the proper and only province of the jury. *Fost.* 257.

Rule the Third.

But whether, upon a supposition of the truth of the facts, such homicide be justified, excused, or alleviated must be submitted to the judgment of the court; for the construction the law putteth upon the facts stated and agreed or found by a jury is, in this case, as in all other cases, undoubtedly the proper province of the court. *Ibid.*

As in the KING v. Major JOHN ONEBY, indicted for the murder of William Gower, esq. *Old-Baily*. RAYMOND, J. after argument on a special verdict removed into *Banco Reg.* 13 Geo. 1. & 1 Geo. 2. laid down this proposition, to which all the judges agreed, that the court are judges of the malice and not the jury; and that the court are also judges of the fact found by the jury, whether if the quarrel was sudden, there was time for the passion to cool, or whether the act was deliberate or not. 9 *St. Tr.* 2 Lord Raym. 1493. 2 *Strange*, 773.

FOSTER says, in cases of doubt and real difficulty, it is commonly recommended to the jury to state facts and circumstances in a special verdict; but where the law is clear, the jury under the direction of the court, *in point of law*, matters of fact being still left to their determination, may, and if they are well advised, will always find a general verdict conformable to such direction.

*Ad questionem juris non respondent juratores. Foster, 257.
The King v. Major Oneby, above cited.*

Rule the Fourth.

MALICE defined.—When the law maketh use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood in the modern use of the word, a *principle of malevolence to particulars*; for the law by the term *malice*, in this instance, meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit. *Fost. 256.*

In the case of an appeal of death, which was antiently the ordinary method of prosecution, the term *malice* is not made use of as descriptive of the offence of murder, in contradistinction to simple felonious homicide. The precedents charge that the fact was done *nequiter in feloniam*, which fully taketh in the legal sense of the word *malice*. The words *per malitiam* and *malitiosè* our oldest writers do indeed frequently use in some other cases, and they constantly mean an action flowing from a wicked and corrupt motive, a thing done *malo animo, mala conscientia*, as they express themselves. *Fost. 256.*

The method of proceeding in antient times in a case of robbery or larceny, where the stolen goods were found, upon the defendant, was, that if he alledged that he bought them of another, whom he named and vouched to warranty, the vouchee, if he appeared and entered into warranty, was to stand in the place of the defendant *pro bono et malo. De corona, ca. 32. sec. 7.*

* *Bracton* saith, *intra quondaque in defensionem et warrantum aliquis malitiosè et per fraudem et per mercedem, sicut campio conductitius. Lib. 1. ca. 38. sec. 8, 9.*

Fleta, on the same subject, after stating the case of the hired champion in *Bracton's* words, putteth another similar to it. A person in holy orders entereth into warranty for hire, but refuseth to take his trial before lay judges, *propter privilegium clericale*. In this case, saith he, the warranty availeth nothing. "*Et clericus gaude pro malitia committetur et redimatur.*"

* Let those who have *Bracton*,^{The}
seek in that Work for the
correction of this passage.

The *legislature* hath likewise frequently used the terms *malice* and *maliciously* in the same general sense, as denoting a wicked purpose and incorrigible disposition. *Fost.* 257.

The statute *de Malefactoribus in parvis* reciteth, that those trespassers did frequently refuse to yield themselves to justice; "*Immo-malitiam suam exequendo et continuando*," did fly or stand upon their defence. *Stat.* 21 *Edw.* 1. *stat.* 2.

And 4 & 5 *Philip & Mary*, *ca.* 4. enacteth, "that every person that shall *maliciously* command, hire, or counsel any person to do any robbery, and being arraigned, shall stand mute, of *malice*." The word in both part of the act plainly importeth a wicked, perverse, and incorrigible disposition. *Fost.* 257.

In the same latitude are the words *malice aforethought*, to be understood in the statutes which oust clergy in the case of wilful murder. The *Malus animus*, which is to be collected from all the circumstances, is what bringeth the offence within the denomination of wilful malicious murder: whatever might be the immediate motive to it, whether it be done as the old writers express themselves, "*Ira vel odio, vel causa Lucri*," or from any other wicked or mischievous intention. *Fost.* 257.

And most, if not all the cases ranged under the head of *implied malice*, will turn upon this single point, that the fact hath been attended with such circumstances as to carry with them the plain inclinations of an heart regardless of social duty and fatally bent upon mischief. *Fost.* 257.

For example—In the *QUEEN v. MAWGRIDGE*, 5 *Ann.* *B. R.* *malice* was thus defined. Some have been led into a mistake by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing, for some considerable time *before* the commission of the facts, which is a mistake arising from not distinguishing between *hatred* and *malice*. *Envy*, *hatred*, and *malice* are three distinct passions of the mind. 1st. *Envy* properly is a repining or being grieved at the happiness and prosperity of another, *Invidus alterius rebus macrescit opimis*. 2d. *Hatred*, which

which is *odium*, is as Tully saith, *Ira inveterata*; a rancour fixed and settled in the mind of one towards another, which admits of several degrees. It may arrive at so high a degree, and may carry a man so far as to wish the hurt of him, though not to perpetrate it himself. 3d. *Malice* is a design formed of doing mischief to another, *cum quis data opera male agit*, he that designs and useth the means to do ill, is malicious. 2 *Inst.* 42.

By *stat. 5 Hen. 4.* if any one out of malice prepered shall cut out the tongue or put out the eye of another, he shall incur the pain of felony. If one doth such a mischief of a sudden, that is, malice prepered; for, saith Coke, if it be *voluntarily, the law will imply malice. Kelyng. 126. Holt. 484.* See also *Holloway's case, Cro. Car. 131. W. Jones, 198. 1 Hale, P. Cr. 454. Palm. 585.*

The definition of *malice implied* is, where it is not express in the nature of the act; as where a man kills an officer that had authority to arrest his person: the person who kills him in defence of himself from the arrest, is guilty of *murder*, because the malice is implied; for properly and naturally it was not malice, for his design was only to defend himself from the arrest. *Ibid. Vide this point illustrated. Ante 485 to 491.*

In the *KING, v. ONEBY, Trinity, 13 Geo. 1. and Geo. 2. B. R.* the same doctrine is laid down. The court there said, without entering into a nice examination of the several definitions or descriptions of murder as they are found in the old law-books, as *Bracton, Briton, and Fleta*, where the wickedness of the act is aggravated by circumstances of secrecy or treachery, murder has been long since settled to be the *voluntary killing* a person of *malice prepense*, and that, whether it was done secretly or publicly. *Staundf. Pl. Cr. 18. b. 3. Inst. 54. 9 St. Tr. 19. 2 Lord Raym. 1493. 2 Stra. 773.*

But then it must be considered what the word malice in such case imports. In common acceptation malice is took to be a settled anger (which requires some length of time) in one person against another, and a desire of revenge; but in the *legal* acceptation it imports a wickedness, which includes circumstances attending an act, that cuts off all excuse.

By

By 25 Hen. 8. ca. 33, for taking away clergy, it is enacted, that every person who shall be indicted of the crimes therein mentioned and thereupon arraigned and stand mute of *malice* or frowardness of mind, shall lose the benefit of his clergy. Now in that case malice can never be understood in its vulgar sense; for the party cannot be thought to stand mute out of a settled anger or desire of revenge, but only to save himself; and therefore such standing mute and refusing to submit to the course of justice, is said to be done wickedly, that is, without any manner of excuse, or out of frowardness of mind.

This malice is an essential ingredient to make the killing a person murder, and must be either *implied* or *expressed*: and this implied malice is collected either from the manner of doing or from the person slain, or the person killing. *Hale. P. C. 451.*

As to the first, the manner of doing, or the nature of the action, *First*, wilfully poisoning any man implies malice. *Secondly*, If a man doth an act that apparently must do harm, with an intent to do harm, and death ensues, it will be murder. As if *A.* runs with a horse used to strike, among a multitude of people, and the horse kills a man, it will be murder, for the law implies malice from the nature of the act. *Thirdly*, killing a man without provocation is murder. *Lord Morley's ca. Keyling 56. Keil's ca. 1 Lord Raym. 138. Comb. 406. Tooley's ca. 2 Lord Raym. 1298.*

Rule the Fifth.

The law will imply malice from the nature of the original action or first assault, though blows pass between the parties before the stroke is given which occasions the death. *Hugget's case, Keyl. 62. Tooley's case, and Oneby's case. 2 Lord Raym. 1300, 1302. 1489. Ante*

Rule the Sixth.

Malice expresses being a design formed for taking away another man's life, or of doing some mischief to another,
in

in the execution of which design death ensues; such death is murder, even where such design is not formed against any particular person. *Lord Dacre's case.* 1 *Hale's P. C.* 465. *Moor* 86. *Sav.* 67. 2 *Lord Raym.* 1485. *S. C. with arguments of counsel.* *Stra.* 766. *S. C. with the evidence and indictment.* 9 *St. Tr.* 14. 2 *Lord Raym.* 1584. *Huggin's case.*

Rule the Seventy.

Where an indictment sets forth all the special matter in respect whereof the law implies malice, a variance between the indictment and evidence, as to the circumstances doth not hurt, so that the substance of the matter be found. 2 *Hawk. P. C. ca.* 46.

As in *Mackally's case, East.* 9 *Jac.* 1. The prisoner was indicted for the murder of a serjeant at mace, in *London*, upon an arrest. It was supposed that the sheriff had made a precept to such serjeant for the arrest, but upon the evidence it appeared that there was not any such precept, but that the serjeant made the arrest *ex officio* at the plaintiff's request upon the entry of the plaint according to the custom of the city. The court ruled the killing of the officer to be murder; for the substance of the matter is, whether the defendant killed an officer in the legal execution of his duty. 9 *Co.* 62. *Vide Ante* 485.

Vide the foregoing rules in this chapter, illustrated in the next subsequent chapter on homicide.

CHAPTER XIV.

OF HOMICIDE.

HOMICIDE, according to *Foster's* distinctions is, either occasioned by accident, which human prudence cannot see or prevent, vulgarly called *chance-medley*; or is founded in justice; or in necessity; or is owing to a sudden

sudden transport of passion, which through the benignity of the law, is imputed to human infirmity, and is called *manslaughter*; or is founded in *malice*, which constitutes murder. Vide the last antecedent chapter.

By murder, at this day is understood, the wilful killing of any subject whatsoever, through *malice forethought* whether the person slain be a native or foreigner. *Stamf. l. i. c. 10. 3 Inst. 47.*

And the indictment of murder essentially requires these words, *felonice ex malitia sua precogitata interfecit et murderavit*: but the indictment of simple homicide is only *felonice interfecit*. 1 *Hale P. C. 450.* Vide 1 and 2 rule; ca. *Malice. Ante 546, 547. 4 Blackf. Comm. 194.*

Rule the First.

In order to bring the case within the meaning of *chance medley*, that is homicide occasioned by accident, which human prudence could not foresee or prevent, there must be evidence to shew, that the act upon which the death ensued was lawful. *Fost. 258.*

For if the act be *unlawful*, that is *malum in se*, the case will amount to felony, either murder or manslaughter, as the circumstances given in evidence may vary the nature of it. If it be done in prosecution of a felonious intention, it will be murder; but if the intent went no further than to commit a bare trespass, manslaughter. *Ibid.*

Foster thus illustrates the above rule. A. shooteth at the poultry of B. and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances (given in evidence) it will be murder, by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely manslaughter. *Foster 259. Kelynge 117. 3 Inst. 56.*

Rule the Second.

But if the act be not *malum in se*, but *malum prohibitum*, as shooting at game, by a person not qualified by statute

statute to keep a gun, or to use a gun for that purpose, the case of a person so offending, will fall under the same rule as that of a qualified man, for the statutes prohibiting the destruction of the game *under certain penalties*, will not in a question of this kind, enhance the accident beyond its intrinsic moment. *Foster* 259.
 † *Hale* 475.

Rule the Third.

Death ensuing from accidents happening at sports and recreations, *such recreations being innocent and allowable*, falls within the rule of excuseable homicide. *Fost.* 259.

Rule the Fourth.

If an action unlawful in itself be done deliberately, and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall where it may, and death ensue, against or beside the original intention of the party, it will be murder. But if such an original intention doth not appear, which is matter of *fact*, and to be collected from circumstances (given in *evidence*) and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death; because the act upon which death ensued was unlawful. *Foster* 261.

Rule the Fifth.

Where a blow aimed at one person lighteth upon another and killeth him, this is murder. *Fost.* 261.

As in the *KING v. PLUMMER*, *Kent assizes, Summer, 18 Will. 3.* *Plummer*, and seven others, opposed the king's officers in the act of seizing wool. One of those persons shot off a fusce and killed one of his own party.

The COURT held, in giving judgment upon a special verdict, that as the prisoner was upon an unlawful design, if he had in pursuance thereof discharged the fusce against any of the king's officers that came to resist

sift him, in the prosecution of that design, and by accident had killed one of his own accomplices, it would have been murder in him. As if a man out of malice to A. shoots at him to kill him, but misses him and kills B. it is no less a murder than if he had killed the person intended. 12 Mod. 627, *Kelyng* 111. Lord Raym. 1581. 9 St. Tr. 112. *Higgins's case*. Dyer 128. Pl. 60. *Crompt*. 101. Pl. 474. 9 Co. 81, *Agnes Gore's case*. D. *Williams's case*, cited in the *Queen v. Maywrigde*. *Kelyng* 131, 132. 9 St. Tr. 61.

So in the *QUEEN v. SAUNDERS*, Hilary, 18 Eliz. The defendant intending to kill his wife gave her a poisoned apple, and she being ignorant of the apple's being poisoned, gave it to a child, against whom the prisoner never meant any harm, and against his will and persuasion, and the child eat it and died. This was ruled to be murder in him, but not in the wife, 2 Plowd. Com. 474.

So in the *KING v. AGNES GORE*, Mich. 9 Jac. 1. before FLEMING, C. J. and TANFIELD, C. B. The prisoner mixed poison in an electuary, of which her husband and her father, and another took part and fell sick. *Martin*, the apothecary, who had made the electuary, on being questioned about it, to clear himself took part of it and died. On this evidence a question arose, whether *Agnes Gore* had committed murder; and the doubt was, because *Martin*, of his own will, without invitation or incitation or procurement of any, had not only eaten of the electuary, but had by stirring it so incorporated the poison with the electuary, that it was the occasion of his death.

The JUDGES resolved, that the prisoner was guilty of the murder of *Martin*, for the law conjoins the murderous intention of *Agnes* in putting the poison into the electuary to kill her husband, with the event which thence ensued; *Quia eventus est qui ex causa sequitur, et dicuntur eventus quia ex causis eveniunt*, and the stirring of the electuary by *Martin*, without putting in the poison by *Agnes*, could not have been the cause of his death. 9 Co. 81. 1 Hale P. C. 50. *Jenk. Cent.* 290. *Crompt. Just.*

Just. 23. *pl.* 24. 3 *Inst.* 51. *Plowd. Com.* 474. 1 *Hawk.*
P. C. ca. 31. *sec.* 3. 1 *Hale P. C.* 431, 436, 442, 447.

With the decisions in the above cases *Foster* concurs: for, says he, if from circumstances it appears, that the injury intended to A. be it by poison, blow, or any other means of death, would have amounted to murder, supposing him to have been killed by it, it will amount to the same offence, if B. happeneth to fall by the same means. For where the injury intended against A. proceeded from a wicked, murderous, or mischievous motive, the party is answerable for all the consequences of the action, if death ensueth from it, though it had not its effect upon the person he intended to destroy. The *malitia* already explained, the heart regardless of social duty, and deliberately bent upon mischief, and consequently the guilt of the party is just the same in the one case as in the other. But, if the blow intended against A. and lighting on B. arose from a sudden transport of passion, which in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation if B. should happen to fall by it.

From this it appears, that such circumstances as above stated, cannot be legally nor justly brought within the rule of *accidental death*, as they sometimes are, through the ignorance or lenity of juries. *Fost.* 261, 262.

Rule the BIRTH.

It is not sufficient that the act upon which death ensueth be lawful or innocent, it must be done in a proper manner, and with due caution, to prevent mischief.

For example.—Parents, masters, and other persons, having authority *in foro domestico*, may give reasonable correction to those under their care; and if death ensue without their fault, it will be no more than accidental death. *Fost.* 262. *Dalton's Just. last edit.* 285. 1 *Hale P. C.* 454.

But if the correction exceedeth the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder

murder or manslaughter, according to the circumstances of the case.

If with a cudgel or other thing not likely to kill, though improper for the purpose of correction, manslaughter. If with a dangerous weapon likely to kill or maim, due regard being always had to the age and strength of the party, murdered. *Fost.* 262. *Comb.* 408. 1 *Hale P. C.* 474. *Kelyng* 64, 133, 134.

As in the *KING v. JOHN GREY, Old-Bailey sess. October, 1666.* The jury by a special verdict found, that *William Golding*, apprentice to the prisoner, having neglected his business, was reprimanded by his master, who said if he would not serve him, he should serve in Bridewell, to which *Golding* replied, he had as good serve in Bridewell as serve him; whereupon *Grey*, without other provocation, struck *Golding* with a bar of iron which he then had in his hand, of which he died.

The JUDGES were all of opinion, that this was *murder*; for correction must be by such things as are fit for correction, and not by instruments as may probably kill. It is all one as if he had run him through the body; and in such cases if death ensues, the law shall judge it malice prepensed; and as in lord *Morley's* case it is ruled, that words are no provocation to lessen the offence from being murder, if one man kill another upon ill words given to him. *Kelyng* 53, 65.

Rule the Seventh.

In all cases of homicide, occasioned by persons following their lawful occupations, especially such from whence danger may probably arise, it is incumbent on the defendant to shew by *evidence* that he has used all due caution. *Fost.* 262.

For example.—Workmen throwing stones, &c. from a house in the ordinary course of their business, by which a person underneath happened to be killed: If they look out and give timely warning before-hand to those below, it will be *accidental death*. If, without such caution, it will be at least *manslaughter*. It was a lawful act, but done

done in an improper manner. 1 *Hale* 472. *Fost.* 262, 263.

In the *KING v. HULL*, *Old-Bailey sess. January, 1664*. The preceding points are illustrated: but it is there also holden, that there is a great difference where the house stands a distance from the highway, and the doing the same act in the streets of *London*; in the first case where proper caution is given, the death will be but *misadventure*; but in *London* it would be *manslaughter*, because there is a continual concourse of people passing up and down the streets; and therefore the casting down any such thing from a house, is like the case where a man shoots an arrow or a gun into a market-place full of people, if any one be killed, it is manslaughter, because, in common presumption, his intention was to do mischief.

So a person driving a cart or other carriage happeneth to kill. If he saw, or had any timely notice of the mischief likely to ensue, and yet drove on, it will be *murder*, for it was wilfully and deliberately done. If he might have seen the danger, but did not look before him, it will be *manslaughter*, for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be *accidental death*, and the driver will be excused. *Kelyng* 40.

The *KING v. RAMPTON*, *Old-Bailey, January sess. 1664*, is in point. The defendant found a pistol in the street, which he had reason to believe was not loaded, *having tried it with the rammer*, he carried it home and shewed it to his wife, and she standing before him, he pulled up the cock and touched the trigger; the pistol went off and killed the woman. This was ruled manslaughter. *Kelyng* 41.

FOSTER observes, that chief justice HOLT is dissatisfied with this determination; and admitting it to be strictly legal it was *summum jus*, and adds, that the rule of law touching the consequence of taking or not taking due precaution, doth not seem to be sufficiently tempered with mercy. The case of *Brampton*, he thinks not strictly legal, for the law in these cases doth not require the utmost caution that can be used, it is sufficient that a reasonable

reasonable precaution, what is *usual* and ordinary in such cases, be taken. *Foster* 264.

Rule the Eighth.

If the officer of justice who is to execute sentence of death on a malefactor, on his own head and without warrant, or the colour of authority varieth from the judgment, he is guilty of murder. *Vide 1 Hale P. C. from 496 to 502. Foster* 267.

For he wilfully and deliberately acteth in defiance of law, and in so doing, sheddeth the blood of a man, whose person, until execution is done upon him in due course of justice, is equally under the protection of the law with every other subject. *Fost.* 267, 268. 3 *Inst.* 52, 211.

Rule the Ninth.

Where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing, and the party making resistance is killed in the struggle, *evidence* of such resistance justifies the homicide. *Fost.* 270. *Vide Ante* 485, *to this point.*

Rule the Tenth.

But if the party having authority to arrest or imprison in a case criminal or civil, using the proper means, happeneth to be killed; it will be murder in all against whom there is *evidence* of having taken a part in such resistance; for it is homicide committed in despite of the justice of the kingdom. *Fost.* 270. 3 *Inst.* 56. *Roll. Rep.* 189. *Ante* 485.

Rule the Eleventh.

Evidence of flight in order to avoid an arrest in a civil proceeding, and likewise in some cases of a criminal nature, will not justify the defendant; but the homicide

homicide will, notwithstanding the flight, be murder of manslaughter, as the circumstances may vary. *Foster* 271. 1 *Hale P. C.* 481.

For example.—If the officer in the heat of the pursuit, and merely in order to overtake the defendant, should trip up his heels, or give him a stroke of an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will amount to no more than *manslaughter*; if, in some cases, even to that offence; but had he made use of a deadly weapon, it would have amounted to *murder*. In the first place the blood was heated in the pursuit of a lawful prey, and no signal mischief was intended. In the second there would be evidence of *malice*, which determines the nature of the offence. *Foster* 271.

Rule the Twelfth.

The same rule holds in the case of a breach of the peace, or any other misdemeanor short of felony. *Foster* 271.

Rule the Thirteenth.

Where a felony is committed, and the felon fleeth from justice, or a dangerous wound is given; if in the pursuit the party flying is killed, *where he cannot be otherwise overtaken*, evidence of the felony and the flight will justify the homicide. *Foster* 271.

For it is the duty of every man to use his best endeavours for preventing an escape; and therefore the pursuit is not barely warrantable; it is what the law requireth and will punish the wilful neglect of: and probably on this rule it was, that the legislature in the case of the marquis *De Guiscard*, who stabbed Mr. *Harley* sitting in council, discharged the party who was supposed to have given him the mortal wound, from all manner of prosecution on that account, and declared the killing to be a *necessary* and *lawful* action. *Foster* 271. 1 *Hale P. C.* 489, 490. *Stat. 9 Ann. ca. 16.* 9 *St. Tr.* 63. in note.

Rule

Rule the Fourteenth.

But if the *felon*, or *person giving* a dangerous wound turns upon the pursuers, and in the scuffle any of them is killed, evidence of *resisting* makes it murder in the party pursued and all his adherents, present and knowingly abetting; for the reasons given above. *Fost.* 272.

Rule the Fifteenth.

Even in case of a sudden affray, where no felony is committed or wound given, if a person interposing to part the combatants, *giving notice to them of his friendly intention*, should be assaulted by them, or either of them, and in the struggle should happen to kill, this would be justifiable homicide. *Foster* 272.

As in the *KING v. THOMAS TOMSON, Old-Bailey, Car. 2.* indicted for the murder of *Allen Daws*. The COURT on considering the fact, specially found by the jury, agreed, that if upon a sudden affray, a constable or watchman, or any other that came in aid of them, who endeavour to part the combatants be killed, this is *murder*. So in *Young's case. 4 Co. 40. Mackally's case. 9 Co. 81. Kelyng 66.*

Rule the Sixteenth.

Likewise, if no constable or watchman be there, if any other person come to part the affrayers, and he be killed, this is *murder*.

For every one, in such case, is bound to aid and preserve the king's peace.

Rule the Seventeenth.

But in all those cases it is necessary that the party who was fighting, and killed him that came to part them, did know or had notice given him, that they came for that purpose. *Kelyng 66. 9 Co. 81. 8 Mod. 164. Anonymous. Scamf. P. C. 13. 2 Inst. 52. Fost. 272.*

Rule the Eighteenth.

In case of justifiable self-defence, the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intendeth and endeavoureth by violence or surprize, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable. *Fost.* 273, 274. 1 *Hawk. P. C.* 6 Edit. 122. 1 *Hale P. C.* 481, 484.

A. makes an assault upon B. with an intent to ravish her, she kills him in the attempt, it is *se defendendo*; because he intended to commit a felony. Here the law of self-defence coincideth with the dictates of nature. 1 *Hale, P. C.* 481. *Fost.* 274.

So, as in the *KING v. COOPER*, *East.* 15. *Car.* 1. An attempt is made to commit arson or burglary in the habitation; the owner, or any part of his family, or even a lodger with him, may lawfully kill the assailants for preventing the mischief intended. *Cro. Car.* 544. *Fost.* 274.

So in the *KING v. FORD*, 18 *Car.* 2. Persons rudely forcing themselves into a room in a tavern, against the will of the company in possession, one of the assailants is killed in the scuffle; ruled justifiable homicide. *Kelyng* 52. Doubted to be law. *Foster* 274.

In the *QUEEN v. MAWGRIDGE*, 5 *Ann. Ban. Reg.* The defendant upon words of anger threw a bottle with great violence at the head of the deceased, and immediately drew his sword; the deceased returned the bottle with equal violence. *HOLT*, C. J. ruled it was lawful and justifiable, for he that hath manifested that he hath malice against another is not fit to be trusted with a dangerous weapon in his hand. *Kelyng* 128, 129. *Fost.* 271, 274, 275.

Rule

Rule the Nineteenth.

He who in a case of mutual conflict would excuse himself upon the foot of self-defence must shew, by *evidence*, that before a mortal stroke given he had declined any farther combat, and retreated as far as he could with safety, and also that he killed his adversary through mere necessity and to avoid immediate death. If he faileth in either of these circumstances he will incur the penalties, of manslaughter. *Foss. 277.*

For example: *A.* being assaulted by *B.* returneth the blow, and a fight ensueth. *A.* before a mortal wound given declineth any farther conflict, and retreateth as far as he can with safety, and then in his own defence killeth *B.* this is excusable self-defence; even though *A.* had given several blows, not mortal, before his retreat. *1 Hale, P. C. 479. Stamf. 15. Foss. 277.*

But if the mortal stroke had been first given, it would have been manslaughter. *Ibid.*

But if the first assault be upon *malice*, and the assailant to give himself some colour for putting in execution the wicked purposes of his heart, *retreateth* and then turneth and killeth, this will be *murder*. If he had killed without retreating, it would undoubtedly have been so; and the craft of flying rather aggravateth than excuseth. *Foss. 277. 1 Hale, P. C. 479, 480. Kelyng, 58, 128: Mawgridge's case.* The second part of the rule is illustrated,

In the *KING v. NAILOR, Old-Bailey, April sess. 1704.* The prisoner was indicted for the murder of his brother. The evidence was that he, on the night the fact was committed, came home drunk. His father ordered him to go to bed, which he refused to do, whereupon a scuffle happened between the father and son. The deceased, who was then in bed, got up, fell upon the prisoner, threw him down, beat him upon the ground, and there kept him down, so that he could not escape nor avoid the blows; and as they were so striving together,

was holden clearly to be no more than *manslaughter*. For, says *Foster*, the smart of the man's wound and the effusion of blood might possibly keep his indignation boiling to the moment of the fact. *MSS. Tracy and Denton. Fost. 292.*

The KING v. REASON and TRANTER, for the murder of *Edward Lutteral*, esq. *Hil. 8 Geo. 1.* further illustrates. Mr. *Lutteral* being arrested, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order; as *Lutteral* pretended, to have the debt and costs paid. Words arose at the lodgings about *civility money*, and *Lutteral* went up stairs pretending to fetch money for the payment of the debt and costs, leaving the officer below. He returned with a brace of pistols loaded, which at the importunity of his servant he laid down on the table, declaring, he would not be forced out of his lodgings, and threatened the officers several times. Words of anger arising, *Lutteral* struck one of the officers on the face with a cane, and drew blood. He had a sword on, which was found drawn and broken: but how that happened did not appear in evidence, for part of the affray was at a time when no witness was present. One of the officers appeared to have been wounded in the hand by a pistol shot, for both the pistols were discharged, and in the wrist, by a sharp-pointed instrument, the other slightly wounded by a like weapon; and it also appeared that *Lutteral*, when on the ground, held up his hands as if he was begging for mercy.

Sir JOHN PRATT, C. J. directed the jury, that if they believed Mr. *Lutteral* endeavoured to rescue himself, it would be justifiable homicide in the officers. However, as Mr. *Lutteral* gave the first blow, *accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings*, which it would have been their duty to have done, if the debt had not been paid or bail given, it could be no more than *manslaughter*.

Foster concurs with the chief justice, and observes that the case, as related by *Strange*, is imperfect. *Fost. 293, 294. 1 Stra. 499. 6 St. Tr. 195.*

In

IN ROWLEY'S or ROYLEY'S case, the son fights with a boy and is beaten; he runs home to his father bloody; the father takes a *staff*, runs three quarters of a mile, and beat the other boy, who dies of the beating. This, say the above reporters, has been ruled manslaughter, *because done in a sudden heat of passion*. FOSTER is of opinion that these circumstances shew *malice*, but vindicates the opinion of the court by shewing that *Coke* does not state with what *weapon* or to what *degree* the child was beaten; whereas *Croke* reporting the same case says: "Rowley struck the child with a *small cudgel* of which *a stroke* he afterwards died;" from which and from *Godbolt's* report, which says the blow was with a wand, it may be concluded that the accident happened from a *single stroke* with a cudgel, *not likely to destroy*, and that death did not *immediately* ensue. It was given in *heat of blood*, and not in *malice*, and therefore manslaughter; but had it been given with a *deadly weapon*, or had there been repeated blows, it would have been murder. 12 Rep. 87. Godb. 182. 1 Hale's P. C. 453. Cro. Jac. 296. Cro. Eliz. 778. 5 Burr. 2799. Lord Raym. 144. 1491. 1 Hawk. P. C. 6 edit. 124, 125. Fost. 294, 295. 316.

So in the KING v. ROWLAND PHILIPS, *Trinity*, 18 Geo. 3. It was ruled, that if an officer upon the impress service fire, in the *usual manner*, at the *hallyards* of a boat, in order to bring her too, and kill a man, there being no *malice*, it is only manslaughter. Coop. 830.

Rule the Twenty-second.

The first rule laid down, that words of reproach, nor indecent provoking actions, or gestures of contempt, will not free the party killing from the guilt of murder, without an assault upon the person; will not hold in cases, where from such words or gestures; or indeed upon any other sudden provocation, the parties come to blows, *no undue advantage being sought or taken on either side*. Fost. 295.

As *A.* useth provoking language or behaviour towards *B.* *B.* striketh him, upon which a combat ensueth, in which *A.* is killed. This was holden to be manslaughter, for

for it was a sudden affray, and they fought upon equal terms; and in such combats, upon sudden quarrels, it hat-
tereth not who gave the first blow. 1 Hale P. C. 456.

But if B. had drawn his sword and made a pass at A. his sword then undrawn, and thereupon A. had been killed, this would have been murder: for B. by making his pass, *his adversary's sword undrawn*, shewed that he fought his blood, and A. endeavouring to defend himself, *which he had a right to do*, will not excuse B. But if B. had first drawn, and forbore until his adversary had drawn too, it had been no more than manslaughter. *Kelyng* 61, 138. *Mawgridge's case*. 1 Hawk. P. C. 6 edit. 123. 2 Ld. Raym. 149. *Oneby's case*. 2 Ld. Raym. 1489. 2 *Strange* 771. *Kelyng* 119.

Rule the Twenty-third.

But in every case of homicide, upon provocation, however so great it be, if there is sufficient time for *passion to subside*, and for reason to interpose, such homicide will be murder. *Foster* 296.

For example. A. findeth a man in the act of adultery with his wife, and in the first transport of passion killeth him; this is no more than manslaughter. But had he killed the adulterer deliberately and upon revenge, *after the fact had sufficient cooling time* it had been undoubtedly murder: and in all cases deliberate homicide, upon a principle of revenge is murder. 1 Hale P. C. 486. 1 *Ventr.* 158. *Sir Th. Raym.* 212. *Manning's case*.

Rule the Twenty-fourth.

On the above principle, deliberate duelling, if death ensueth, is murder. *Foster* 297.

But if, as before laid down, upon a sudden quarrel the parties fight upon the spot, or if they presently fetch their weapons and go into the field and fight, and one of them falleth, it will be but manslaughter; because it may be presumed the *blood never cooled*. *Ibid.*

But if they fight at such an interval as that the passion might have subsided; or if from any *circumstances* attend-
ing

ing the case, it may be reasonably concluded, that their judgment had actually controuled the first transport of passion before they engaged, and one falleth, it will be murder. *The King v. Oneby.* 2 *Stra.* 773. 2 *Ld. Raym.* 1489, 1493.

Rule the Twenty-fifth.

Ministers of justice, while in the execution of their offices, are under the peculiar protection of the law: and therefore the killing of officers so employed, hath been deemed murder, as being an outrage wilfully committed in defiance of the justice of the kingdom. *Fost.* 308, 270. 1 *Hale P. C.* 457. *Et. Ante* 485.

This rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business which brought him thither; for he is under the same protection of the law *eundo morando et redeundo*: and therefore if he cometh to do his office, and meeting with great opposition in the retreat he is killed, this will amount to murder. So if he meet opposition by the way and is killed before he cometh to the place, *such opposition being intended to prevent his doing his duty, which is a fact to be collected from the circumstances appearing in evidence*, this likewise will amount to murder. 1 *Hale P. C.* 463. *Foster* 309.

Rule the Twenty-sixth.

And every man who comes in aid of officers who are by the appointment of the crown conservators of the peace; and every man lending his assistance for keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer himself. *Foster* 309. 1 *Hale P. C.* 463. *Vide* ca. 6. *Ante* 485.

Rule the Twenty-seventh.

This protection, under limitations, reaches to private persons interposing for preventing mischief, in case of

an affray, or using their endeavour for apprehending felons, or those who have given a dangerous wound. For those people are in discharge of a duty the law requireth, and the law is their warrant, and they may be considered engaged in the public service, for the advancement of justice. *Foster* 309. *Ante* 561.

Rule the Twenty-eighth.

And if in the above cases fresh suit be made, and a *fortiori*, if hue and cry be levied, all who join in aid of those who began the pursuit, are under the same protection of the law, and stand on the same foot. *Foster* 309, 310.

A robbery is committed; the country upon notice riseth and pursueth the robbers, who turn and make resistance, and one of the robbers is killed; this, on the part of the pursuers, is justifiable homicide. But if one of the pursuers is killed by the robbers, or any of them, it will be murder in the whole gang, *joining in such resistance*, whether present at the murder or at a distance; *but taking a part in such resistance*. The law is the same in the case of hue and cry duly levied. 1 *Hale P. C.* 464. *Foster* 310.

Rule the Twenty-ninth.

The ministers of justice in civil suits, under proper limitations, are intitled to the same protection for themselves and followers, and upon the same principles of public justice. *Foster* 310. *Vide ca. 6. Ante* 485.

FOSTER, in explanation of the foregoing rules observes, that with regard to ministers of justice, who in right of their offices are ministers of justice, and in that right alone interpose in riots or affrays it is necessary, in order to make the killing of them murder, that the parties concerned should have some notice with what intent they interpose; otherwise the persons engaged may imagine they came to take a part in the affray. But a small matter will amount to a notification; as commanding the peace, or declaring the intent of interposing, or producing

ducing his staff of office; or if the officer be within his proper district and *known*, or but generally acknowledged to bear the office he assumeth. In the night commanding the peace, or using words of like import notifying his business, will be sufficient. *Kelyng* 66, 115. 1 *Hale* P. C. 460; 461. *Foster* 310, 311. And *Vide Gordon's case*, *Ante* 488.

So in case of arrests upon process, whether by writ or warrant, if the officer named in the process give notice of his authority, and resistance be made and the officer killed, it will be murder; if such notification was true, and the *process be legal*. Private persons interfering in affrays, must give express notice of their friendly intent. *Foster* 311. *Ante* 570.

By *legal process*, whether by writ or warrant, is meant process not defective in the frame of it, issuing in the ordinary course of justice, from a court or magistrate having jurisdiction in the case: and though there may have been error or irregularity in the proceedings previous to issuing of it, yet if the sheriff or officer be killed in the execution of it, this will be murder; for he must, at his peril, pay obedience to it. And therefore on an indictment for such murder, it is sufficient to produce in evidence the writ and warrant, without shewing the judgment or decree. As in the *King v. Rogers*, *Cornwall assizes*, 1738, before lord *Hardwicke*. See the *King v. Taylor*. *Ante* 489. 9 *Co.* 68. a. 1 *Hale* P. C. 457. *Fost.* 311, 312.

So in the case of a warrant from a justice of the peace, in a matter wherein he hath jurisdiction, the person executing such warrant, is under the special protection of the law, though such warrant may have been obtained by imposition on the magistrate, and by false information touching the matters in it. The *King v. Richard Curtis*. *Foster* 312. The *King v. Richard Baker*, on the execution of an attachment. *Leach Cr. Ca.* 3 edit. 131. 1 *Hale* 463. 1 *Stra.* 499. 6 *St. Tr.* 195. 9 *Co.* 66, 68. *Cro. Jac.* 280, 486. 10 *St. Tr.* 462. *Cowp.* 3. 1 *Haruk.* P. C. 6 edit. 129, 130.

But if the process be defective in the frame of it, as if there be a mistake in the name, or addition of the person

person on whom it is to be executed, or if the name of such person, or of the officer, be inserted without authority, and after the issuing of the process, or the officer exceeds the limits of his authority and be killed, this will amount to no more than manslaughter *in the person whose liberty is so invaded.* 1 *Hale P. C.* 457. *Foster* 312.

FOSTER examines the case of the *Queen v. Tooley*, and others, and concludes, that an illegal arrest and imprisonment is not a justification for killing the officer so arresting. *Fost.* 312, to 316. 2 *Ld. Raym.* 1296.

In the case of private persons using their endeavours to bring felons to justice, they must shew that a felony has been committed; for no *suspicion* will bring the person interposing within the protection of the law, as above stated. 2 *Inst.* 52, 172. *Cro. Jac.* 194. *Foster* 318.

Supposing a felony to have been committed, but *not* by the person arrested, or pursued upon suspicion, this suspicion will not excuse the person arresting or imprisoning, from the guilt of manslaughter, if he killeth, or on the other hand, make the killing of him amount to murder. 1 *Hale* 490. *Foster* 319.

But if A. being a peace-officer, hath a warrant from a magistrate for the apprehending of B. by *name*, upon a charge of felony; or if B. standeth indicted for felony, or if the hue and cry be levied against B. by *name*, in these cases if B. though innocent, flieth, or turneth, and resisteth, and in the struggle or pursuit is killed by A. or any person joining in the hue and cry, the person so killing will be indemnified. And on the other hand, if A. or any person joining in the hue and cry, is killed by B. or any of his accomplices joining in that outrage, such occision will be murder; for A. and those joining with him were, in this instance, in the discharge of a duty the law requireth of them, and subject to punishment in case of a wilful neglect of it. *Ibid.* *Ante* 569.

Rule the Thirtieth.

In the execution of *civil* process, the officer cannot justify the breaking open an outward door or window,
for

for a man's house is his castle for safety and repose to himself and family, and he who breaks it, cannot be aiding in the discharge of his duty, in the instance in which he is committing a trespass. But if he findeth the door open, or gaineth admittance from within, he having a lawful call to the place, cannot be a trespasser in entering the house, and may break open inward doors, if he find that necessary to execute his process. 2 *Roll. Rep.* 137. *Palm.* 52. 1 *Hale P. C.* 458, 459. *Cowp.* 1.

Rule the Thirtieth.

But if a stranger, whose ordinary residence is elsewhere, upon a pursuit taketh refuge in the house of another, as this is not *his* castle, he cannot claim the benefit of sanctuary in it; neither has a *lodger* such privilege, for he is not the occupier of the house. 5 *Co.* 93. 2 *Hale P. C.* 117. *Foster* 320. *Cowp.* 1. *Lee v. Gansell.*

Rule the Thirtieth-second.

But where a felony has been committed, or a dangerous wound given, or where a minister of justice cometh armed with a process, founded on a breach of the peace, the party's own house is no sanctuary for him. Doors, may in any of these cases be forced, the notification, demand, and refusal, before mentioned, having been previously made: but bare suspicion touching the guilt of the party will not warrant a proceeding to this extremity, though a felony hath been actually committed; unless the officer cometh armed with a warrant from a magistrate, grounded on such suspicion. *Foster* 320, 321.

Rule the Thirtieth-third.

Gaolers, and their officers, are under the same special protection that other ministers of justice are; and they may give in evidence the same facts to justify or palliate; but if the death of a prisoner be owing to cruel and oppressive usage on the part of the gaoler, or any officer
of

of his, to *durefs of imprifonment*, it will be deemed wilful murder in the perfon guilty of fuch durefs.

In *CASTELL*, widow, *v. BAMBRIDGE and CORBET*. Appeal of murder. *Hil. 3 Geo. 2. B. R.* A gaoler, knowing that a prifoner infected with the fmall-pox, lodged in a certain room in the prifon, confined another prifoner, *againft his will*, in the fame room. The fecond prifoner, who had not had the diftemper, *of which the gaoler had notice*, caught the diftemper and died of it. This was ruled to be murder. 2 *Str.* 856. 9 *St. Tr.* 107. *Fofter* 322.

And in the *KING v. HUGGINS*, *Mich. 4 Geo. 2. B. R.* Indictment for murder. It appeared in evidence that the deceafed, a prifoner in the Fleet, was confined for a long time in a low, damp, unwholfome room, without being allowed the common neceffaries of chamber-pot, &c. for keeping things fweet and clean about him; contracted an ill habit of body which brought on diftempers of which he died, and this was holden to be murder in the party guilty of this durefs. 2 *Lord Raym.* 1576. 2 *Str.* 882. *S. C.* 1 *Barnard B. R.* 358, 396. *Fitzg.* 177. 9 *St. Tr.* 107. *Fofter* 322.

CHAPTER XV.

Of Evidence to fupport an Indictment for Petit-Treafon.

Rule the Firft.

EVIDENCE which is applicable to an indictment or appeal of murder, may alfo be applied to an indictment for petit treafon, for both offences are to be confidered as fubftantially the fame, and murder is included in every charge thereof.

Rule the Second.

By ftat. 25 *Edw. 3. fec. 5. c. 2.* no offences fhall be adjudged petit treafon, except in the following instances.

Firft,

First, where a *servant kills his master*. Secondly, where a *wife kills her husband*. Thirdly, where an ecclesiastical man, secular or religious, kills his prelate, to whom he owes obedience. Therefore to support an indictment for this crime, the relative situation of the prisoner to the party deceased, must be satisfactorily proved in evidence.

Rule the Third.

Evidence of procuring, aiding, or abetting, any of these offences, brings the party within the meaning of the statute. 3 *Inst.* 20, 21, 138. 1 *Hale P. C.* 379. *Dyer* 332. 1 *Hawk. P. C. ca.* 32. 7 *edit.*

Rule the Fourth.

If there be evidence that the fact was done upon a sudden falling out, or in the party's necessary self-defence, &c. it cannot be petit treason, in as much as all petit treason implies murder; and *vice versa*, generally wherever the circumstances are such, as will make the killing of a stranger by a stranger murder, they make the killing or murder of a husband or master petit treason. 1 *Hale. P. C.* 378, 380. *Dalis* 16. *Dalt. ca.* 91. *Crompt.* 19, 20. *Dyer* 254. 1 *Hawk. P. C. ca.* 32. 7 *edit.*

CHAPTER XVI.

Of Evidence to support an Indictment on the statute of Stabbing.

BY *stat.* 1 *Jac.* 1. *ca.* 8. if any person shall *stab* or *thrust* any person that hath not then any weapon *drawn*, or that hath not first stricken the party killing, and the person so stabbed or thrust die in six months; except in cases of self-defence, misfortune, or for preserving the peace,

peace, or chastising his child or servant, such offender, shall, &c. suffer death without benefit of clergy, *Irisb. 7 Will. 3. ca. 11. 3 Stat. at large 278.*

Rule the First.

In all cases, [where the evidence amount to justifiable or excusable homicide, or barely to manslaughter at common law, the justice or benignity of the common law hath over-ruled the rigour of the statute *Foster 299.*

Rule the Second.

Under the words *thrust* or *stab* it hath been held, that evidence of shooting with any sort of *fire-arms*, sending an arrow out of a bow, a stone from a sling, or using any device of that kind, *holden in the hand of the party*, at the instant of discharging it, or thrusting with a staff, or other *blunt* weapon, will support the indictment. But throwing at a distance, and wounding the party whereby death ensueth, the weapon being what it may, *being delivered out of the hand*, at the time the stroke was given, hath not been thought to come under the notion of stabbing or thrusting, *1 Hale 469, 470. Foster 390.*

As in the *KING v. NEWMAN, Old-Bailey, Octob. 8 Ann.* where the point of a sword was thrown at twenty yards distance. *Fost. in note, 300.*

Rule the Third.

An ordinary cudgel, or other thing proper for defence or annoyance, in the hand of the party, hath been considered as a *weapon drawn*, so as to take the case out of the statute. *1 Hale P. C. 470. Godb. 154. Aleyn 43. 1 Hale P. C. 468. 2 Hale P. C. 344. Styles 86.*

Rule the Fourth.

In all cases of *doubt* and difficulty upon the construction of the statute, the benignity of the common law ought to turn the scale in favour of the prisoner. *Fost. 302. Ante 4.*

CHAPTER

CHAPTER XVII.

Of Circumstantial or Presumptive Evidence, and how far it supports an Indictment.

THERE be three sorts of presumption, viz. VIOLENT, PROBABLE, LIGHT, OR TEMERARY.

Violenta presumptio is many times *plena probatio*; *presumptio probabilis* moveth little; but *presumptio levis seu temeraria* moveth not at all. *Co. Lit.* 6.

These *presumptions* are: *First*, of LAW, which are necessary and absolutely conclusive. *Secondly*, of FACT.

There are presumption of fact in *civil* and in *criminal* cases; the last are the subject of this chapter.

Rule the First.

If a man be found suddenly dead in a room, and another be found running out in haste with a bloody sword, this is a violent presumption that he is the murderer: for the blood, the weapon, and the hasty flight, are all necessary concomitants to such horrid facts; and the next proof to the sight of the fact itself, is the proof of those circumstances that do thus indicate the facts. *Co. Litt.* 6. *b. S. P. C.* 179. *a.* 2 *Hawk. P. C. ca.* 12. *sec.* 12. *ca.* 45. *sec.* 7. *ca.* 46. *sec.* 2. 1 *St. Tr.* 181, 3 *St. Tr.* 930.

In the KING v. THOMAS RADCLIFFE CRAWLEY, at a commission of oyer and terminer, Dublin, February, 40 Geo. 3. The defendant was indicted for murder, and the evidence was *circumstantial*, but so strongly connected by facts, as to raise the strongest *presumption* of his guilt.

W. SMITH, B. observed, that in cases of *circumstantial* evidence, it is necessary that all the witnesses be persons of unimpeachable veracity, for it is possible the prisoner may be innocent of the crime. In cases of *circumstantial* evidence, there is great room for doubt, as to the guilt of the prisoner, and it is a principle in

law, that in every case of *doubt*, a jury should lean to the merciful side and acquit. Vide CHAMBERLAINE, J. and MICH. SMITH, B. to this point. *Ante* 4, 5, 6.

This principle established a great ground of distinction between civil and criminal law. Every thing is a doubt in a civil case, where the jury weigh the evidence, and having struck a fair balance, decide according to the weight of the evidence. This, however, is not the rule in criminal cases, for it is an established maxim, that the jury are not to *weigh* the evidence, but in cases of *doubt* to acquit the prisoner.

This humane principle of the law, however, is not to be perverted, in order to facilitate the escape of the offender. It is not a sufficient ground to acquit that there is a *possibility* that the accused may be innocent of the charge, for there would be no end to possibilities. He was sorry to say, but it was the truth of the assertion, that renders the situation of a jury so awful, that there is no case where a jury can procure *certainly*, from circumstantial evidence, and that in every such case the verdict of a jury is but on *conjecture*.

It would, notwithstanding, be no sufficient reason to acquit the prisoner, because there is a *possibility* of his innocence. To acquit on such ground, would be contradictory to the legal principle of circumstantial evidence, for where that evidence is given, there is always a possibility of innocence.

It is right such evidence should go to a jury; and, particularly in the case of murder. In cases of inferior personal injuries, there is a direct testimony of the injured individual; but in *murder*, which is generally committed in secrecy, there can be no testimony of the injured person, he is completely removed; it is necessary to bring the offender to justice, and therefore circumstantial evidence shall be received.

As to *light presumptions*, the BARON observed, there were many circumstances which when first offered in evidence, only raise a *presumption*, which the law calls light, and considers insufficient to ground a conviction. Yet if the appearances so alter, and the facts given in evidence

evidence be not accounted for, the presumption which at first was *light* will become *violent*, and such as will afford a foundation for a verdict of conviction.

It was for the *jury* to inquire whether the last observation was applicable to the present case.

Character is of great weight in every case, and requires particular attention when the charge is grounded on circumstantial evidence: it creates a greater degree of *doubt* than where the prosecution is supported by direct evidence. In the former case *character* ought to be particularly attended to, because the jury is more or less embarrassed and called upon to weigh the case with more scruple and doubt from the very nature of the testimony on the part of the crown.

Presumption will become serious when the appearances are not accounted for by those in whose power it is to account for them. At the same time should the jury lay any stress upon the circumstances given in evidence against the prisoner, they should also lean to those that are favourable to his case. He had the authority of the law to say, that though a man charged with an offence should *fly*, that it is not conclusive evidence of guilt. The jury could not forget that one of the oaths they had taken was, whether the prisoner had fled in consequence of the charge made on him; but though it should be established that he fled in consequence of the charge, yet it did not follow of necessity that he was guilty of the murder; yet it was a circumstance material, unfavourable, and suspicious. *From the trial by Leon. Mac Nally, jun. p. 63.*

Rule the Second.

Recent possession, especially of goods not according to the circumstances and habit of the life of the party charged is a *presumption* against him. *The King v. Mahew, Bury spring assizes, 1789. Gilb. Evid. by Lest. 898.*

Rule the Third.

The introduction of a falsehood into the defence is a *presumption* against the prisoner. This presumption is heightened, if the falsehood is to be supported, as it almost necessarily must, by a witness conscious of it. *The King v. Clark, per Grose, J. Bury spring assizes, 1789. Gilb. Evid. by Loft. 898.*

Rule the Fourth.

Presumptive evidence of *felony* should be admitted cautiously, for the law holds, that it is better ten guilty persons should escape than that one innocent man should suffer. 4 *Blackf. Comm.* 352. 2 *Hale's P. C.* 289.

Rule the Fifth.

A defendant should never be convicted for stealing the goods of a *person unknown*, merely because they are found in his possession, and he refuses to give an account how he came by them; unless there are due proofs made that a felony was committed of these goods. 2 *Hale's P. C.* 290. 4 *Blackf. Comm.* 352.

Rule the Sixth.

A defendant should never be convicted of murder or manslaughter, unless the fact of homicide be proved, or at least the body found dead. 2 *Hale, P. C.* 290. 4 *Blackf. Comm.* 352.

CHAPTER XVIII.

Of Evidence to convict the Mother of a bastard Child, charged with concealing its birth.

“ IF any woman be delivered of any issue of her body,
“ male or female, which being born alive, should by the
“ laws

“ laws of this realm be a bastard, and that she endeavoured privately, either by drowning or secret burying thereof, or any other way, either by herself or the procuring of others, so to conceal the death thereof as it may not come to light whether it were born alive or not, but be concealed; in every such case the said mother so offending shall suffer death, as in the case of murder, except such mother can make proof by one witness at the least that the child whose death was so intended to be concealed was born dead.” *Stat. 21 Jac. 1. ca. 27. Irish. Stat. 6 Ann. ca. 4.*

Rule the First.

If there be no concealment proved, yet it is left to the jury to inquire whether she murdered her infant or not, by those circumstances that occur in the case, as if it appear by evidence that it was wounded or hurt, &c. but it doth not put her upon an absolute necessity of proving it born alive by one witness, and so the evidence stands but at common law. *Hale, P. C. 289.*

Rule the Second.

If upon view it be testified by one witness, by apparent probabilities, that the child was not come to its *debitum partus tempus*, as if it have no hair or nails, or other circumstances, this is taken to be a *proof*, that the child was born dead so as to leave it nevertheless to the jury, as upon common law evidence, whether she were guilty of the death of it or not. *Ibid.*

The learned judge then states his opinion on *presumptive evidence*; for which vide *ante* 577.

The case of ANN DAVIS, *Newgate, August 16, Car. 2.* before KEYLING, C. J. lord BRIDGEMAN, C. J. and WYLDE, recorder of London, on an indictment for murdering her male bastard child.

It was agreed by the judges, *First*, That where there is evidence that a woman has endeavoured to *conceal* the death of her bastard child, within the statute, there is no need of any *proof* that the child was born alive, or that there were any signs of hurt upon the body, but it shall

shall be undeniably taken that the child was born alive and murdered by the mother. *Secondly*, That where a woman lay in a chamber by herself and went to bed without pain, and waked in the night and knocked for help but could get none, and was delivered of a child, and put it in a trunk, and did not discover it until the following night, yet she was not within the statute, because she knocked for help. *Thirdly*, That if a woman confess herself with child before hand, and afterwards be surprised and delivered, no body being with her, she is not within the statute; because there was no intent of concealment. And therefore, in such cases it must appear by signs of hurt upon the body, or some other way that the child was born alive. 2 *Hawk. P. C. ca. 46. Kel. 32, 33.*

BLACKSTONE observes, that this statute favours pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother; but it has of late years been usual upon trials for this offence to require some sort of *presumptive* evidence that the child was born alive, before the other constrained presumption (that the child whose death is concealed was therefore killed by its parent) is admitted to convict the prisoner. 4 *Comm. 198, 352.*

And this humane rule was followed on the trial of *Mary Mulhall*, convicted at the assizes for the *Queen's county*, before lord KILWARDEN, C. J. *summer, 1800.*

Barrington considers this statute a law of severity, as it substitutes *presumption* of guilt in the room of *actual proof* against the criminal; but he supposes that it arose from the difficulty of proving the offence against the mother, rather than an intention to make a bare concealment arising from a mistaken shame, amount to a capital felony. It must have frequently happened in these prosecutions that the child being found dead, perhaps in the mother's room, she insisted upon its having been born in that state of which no witness being able to prove the contrary, she was of course acquitted. If the dead child, however, was found with any marks of violence upon it, he apprehends that this with other circumstances might have proved the guilt, even at common law, without

out the intervention of this statute; and the rather as no execution should be permitted, unless the criminal convicted under this act would have been guilty of murder by the common law, as she is otherwise to suffer merely from the *presumption* arising from the circumstance of concealment, of which it is believed there is no other in the English law. If this presumption is by the statute made the offence itself, should it not be encountered by another natural and most strong presumption in favour of the criminal? That is to say, that the mother cannot be supposed to be the wilful author of the death of her new-born child, which by its cries entreats her protection and support, and the father of which she is probably as fond of as if she had a right to call him by the name of husband? And are not children born dead every day? and may not the mother in the agonies of child-birth be the involuntary occasion of the infant's death? As to the circumstance of disposing of the body in places proper for its concealment, if the death is not received from the hands of the mother, it is but a natural consequence of endeavouring to continue to bear a good character in her neighbourhood. *Barrington on the stat. 402.*

DOCTOR HUNTER says, that many pregnant women, under the apprehension of shame, become *insane*, and commit suicide. That others, when the mind is overwhelmed with terror and despair, would destroy themselves if they did not know that such an action would infallibly lead to a disclosure of what they are anxious to conceal. In this perplexity, their distress of body and mind deprives them of all judgment, and they are delivered, *by themselves*; sometimes dying in the agonies of child-birth, and sometimes being exhausted, they faint, and become insensible of what is passing; and when they recover a little strength, find that the child, whether *still-born* or *not*, is *lifeless*. In such a case, will not the best disposition of mind urge the unfortunate woman to preserve her character, by hiding every appearance of what has happened; yet if the discovery be made, that conduct will be set down as a proof of guilt.

After

After giving instances of pregnant women expiring in torture rather than confess their situation, he proceeds to examine the symptoms of violent death in the child. He instances various common and natural appearances both internal and external, *mistaken* for marks of violent death.

In many cases, he says, that to judge of the death of a child it may be material to attend accurately to the force of collision between the skin and the scarf-skin; and, still more to be well acquainted with the appearance of the blood settling upon the external part of the body, and transcending through all the internal parts in proportion to the time that it has been dead, and to the degree of heat in which it has been kept.

When a child's head or face is swollen, and red or black, the *vulgar*, because hanged people look so, are apt to conclude that it must have been strangled. But nothing is more common in natural births, particularly where the navel-string happens to gird the child's neck; and where the head happens to be born some time before the body.

The material question is, how far, in *suspicious* cases, may we conclude that the child was born alive, and probably murdered by its mother, if *the lungs swim in water*? *First*, we must be assured that they contain air: then we are to find out if that air be generated by *putrefaction*. *Secondly*, we are to examine the other internal parts to see if they be emphysematous or contain air, and we must examine the appearance of the air-bubbles in the lungs. If the air which is in them be that of respiration, the air-bubbles will be hardly visible to the naked eye; but if the air-bubbles be large, or if they run in lines along the fissures between the component lobuli of the lungs, the air is certainly emphysematous, and not air which has been taken in by breathing. *Thirdly*, If the air in the lungs be found to be contained in the natural air vesicles, and to have appearance of air received into them by breathing; let us next find out if that air was not blown into the lungs after the death of the infant. It is so generally known that a child born apparently dead may be brought to life by inflating its lungs,

lings, that the mother herself or some other person, might have tried the experiment. It might even have been done with the most diabolical intention, of bringing about the condemnation of the mother! But the most dangerous error is this, *viz.* supposing the experiment to have been made, and that we have guarded against every deception, we may rashly conclude that the child was born alive, and therefore probably murdered, especially in a case where the mother had taken pains by secreting the child, to conceal its birth. This last circumstance, which has generally great weight with the jury, cannot amount to more than ground for *suspicion*, and therefore should not determine a question, otherwise doubtful, between an acquittal and an ignominious death.

Though in the case of a concealed birth, it be made out that the child had breathed, we should not infer that it was murdered; it is a circumstance, like the last, which amounts only to *suspicion*, as appears from the following facts.

First, if a child makes but one gasp, and instantly dies, the lungs will swim in water as readily as if it breathed long and had been strangled. *Secondly*, A child will very commonly breathe as soon as its mouth is born, particularly where there happens to be a considerable interval of time between what we may call the birth of the child's head, and the protrusion of the body; and if this may happen where the best assistance is at hand, it is more likely to happen where the woman is delivered by herself. *Thirdly*, We frequently see children born, who from circumstances in their constitution, or in the nature of the labour, are but barely alive, and after breathing some short time die in spite of all attention; and why may not that misfortune happen to a woman brought to bed by herself? *Fourthly*, Sometimes a child is born so weak, that if it be left to itself after breathing or sobbing, it might probably die; yet may be roused by rubbing, &c. but in the cases above considered, such means of saving life are not to be expected. *Fifthly*, When a woman is delivered by herself, a strong child may be born perfectly alive, and die in a very few minutes, either by lying upon its face in a pool, made

by the natural discharges, or upon wet clothes, excluding air, or drawn close to its mouth and nose by the suction of breathing. An unhappy woman delivered by herself, terrified, distracted, despairing, and exhausted, will not have strength, or collection enough, to fly instantly to the relief of the child. Those facts deserve serious consideration, and when known, may be the means of saving some unhappy and innocent woman: for this reason Dr. *Hunter* originally published his essay, and the same reason has given this extract a place in this work.

CHAPTER XIX.

Of Evidence to support an Indictment for Larceny.

Rule the First.

TO support an indictment for simple grand larceny, there must be evidence to shew a felonious and fraudulent taking and carrying away of personal goods, *not* from the person nor out of his house, above the value of twelve pence. 1 *Hawk. P. C. ca. 33.* *Dalt. ca. 101.* 1 *Hale P. C. 503, 504.*

All felony includes trespass, and every indictment of larceny must have the words *felonice cepit*, as well as *asportavit*; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away; for the taking must be *animo furandi*, and this intent must appear from the evidence. 1 *Hawk. P. C. ca. 33.* *Kelyng 24.* *Dalton 3.*

Therefore one that finds goods that are lost, and converts them to his own use, *animo furandi*, is no felon: and a *fortiori* it must follow, that one who has the actual possession of goods, by delivery, for a special purpose, as a carman, who receives them in order to carry them to a certain place, or a tailor who has them in order to make cloaths, or a friend who is intrusted with them

them to keep, cannot be said to steal them, by embezzling them afterwards." 1 *Hawk. P. C. ca.* 33. 3 *Inst.* 102. 1 *Hale P. C.* 504. 13 *Edw.* 4. 9, 10. *S. P. C.* 25.

Rule the Second.

But even those who have the possession of goods, by the delivery of the party, may be guilty of felony, by taking away part thereof with an intent to steal it.

As if the carrier open a pack and take out part of the goods; or a weaver who has received silk to work, or a miller who has corn to grind, take out part with an intent to steal it; in which case it may not only be said, that such possession of a part, distinct from the whole was gained by wrong, and not delivered by the owner; but also that it was obtained basely, fraudulently, and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one when discovered. 2 *Hawk. P. C. ca.* 33. 1 *Hale P. C.* 505. *S. P. C.* 25. 13 *Edw.* 4. 9, 10. *Dalt. c.* 102. *Keyling* 35.

So in the *KING v. WILLIAM WYNNE, Old-Bailey, April sess. 1786.* A box was left accidentally in the defendant's hackney coach; the coachman instead of returning it to the owner detained it, opened it, destroyed part of its contents, and pledged the rest.

ETRE, B. observed, that no felonious intention could be supposed to exist in the mind of the defendant, at the moment the property was first acquired, and although the subsequent circumstance of keeping it until it was advertised, was a breach of moral duty, it could not of itself be legally considered as a criminal conversion. But if from the evidence, the jury were satisfied in their consciences, that he had opened the box, not merely from curiosity, but with an intention to embezzle any part of its contents, and that he had actually taken the goods, it would become a matter of legal consideration whether it was felony. The jury found him guilty: and the JUDGES approved of the verdict. *Leach's Cr. Ca.* 3 edit. 460. *The King v. Sears, S. P. Ibid.* 463.

So in the *KING v. MURRAY, Old-Bailey, October sess. 1784.* If the clerk to a banker or merchant have the

care of money, or if he have access to it for special and particular purposes, and being sent to the bag or drawer where it is kept, and clandestinely takes out other money for his own use, such taking is felony. 1 *Vol. 7 edit. Hawk. P. C.* 209.

Rule the Third.

In general, where the delivery of the property is made for a certain special and particular purpose, the possession is still supposed to reside, unparted with, in the first proprietor.

Therefore in the *KING v. WILLIAM BASS, Old-Bailey, May sess. 1782*. It appeared in evidence, that the prisoner was servant to the prosecutor, and was sent with goods from his master's house to deliver them to a customer. In his way two men invited him into a public house, and persuaded him to open the package and sell the goods, and he received eight guineas to his own use. The *JURY* found him guilty; and the *JUDGES* were unanimous, that the conviction was proper, for the prisoner standing in the relation of a servant, the possession of the goods must be considered as remaining in the master, until, and at, the time of the unlawful conversion of them by the prisoner. The master was to have received the money for them from the customer, and he could at any time have countermanded the delivery of them. The prisoner, therefore, by breaking open the package tortiously, took them from the possession of the owner, and having by sale converted them *animo furandi* to his own use, the taking is felonious. *Leach's Cr. Ca.* 3 edit. 285, 286. *Kelyng* 35. *Vide Vale v. Bale. Cowp.* 294, 296.

So if a watchmaker steal a watch delivered to him to clean; or if one steal cloaths given for the purpose of being washed; or goods in a chest delivered with the key for safe custody; or guineas delivered for the purpose of being changed into half guineas; or a watch delivered for the purpose of being pawned; in all these instances the law has determined that the goods taken were taken feloniously.

feloniously from the possession of the proprietor. *The King v. Ann Atkinson. Leach's Cr. Ca. 3 edit. 339.*

So if a carrier, after he has brought the goods to the place appointed, take them away again secretly. *animus furandi*, he is guilty of felony, because the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger. 1 *Hawk. P. C. ca. 33.* 3 *Inst. 107.* *B. Cor. 160.* *S. P. C. 25.* 1 *Hale P. C. 505.*

Rule the Fourth.

And not only he who first takes, but in many cases he who receives the goods from another, may be guilty of feloniously taking them.

As if a person intending to steal a horse take out a replevin, and thereby have the horse delivered to him by the sheriff; or if one intending to rifle my goods, get possession from the sheriff, by virtue of a judgment, obtained without any the least colour or title, by false affidavits, &c. in which cases the making use of legal process is so far from extenuating, that it highly aggravates the offence, by the abuse put on the law, in making it serve the purposes of oppression and injustice. 1 *Hale P. C. 507.* 3 *Inst. 108.* *Kelyng 43.* 1 *Siderf. 254.* *Raym. 276.*

Rule the Fifth.

Also, he who steals my goods from J. S. who had stolen them before, may, on the evidence of those facts, be convicted of having stolen them from me; because, in judgment of law, the possession as well as the property, always continued in me. 1 *Hawk. P. C. ca. 33.* *S. P. C. 61, 182.*

Rule the Sixth.

Where it is shewn by evidence, that the property taken has been obtained with a *preconcerted design to steal it*, the possession is supposed to continue with the true owner,

owner, whatever may be the means or the pretence under which the property is obtained.

Therefore, where it appeared in evidence, that a person examined goods under pretence of buying, and runs away with them; or goes into a market, and obtains a horse for the purpose of trying its paces and rides away with it, it is felony. *Raym.* 276.

Or as in the *KING v. PEARS*, *Old-Bailey*, *Sept. sess.* 1779. If a person hire a horse to go to a particular place, and promise to return in the evening of the same day, but immediately sells the horse, and converts the money to his own use, this is felony. *Leach Cr. Ca.* 3 *edit.* 253.

So in the *KING v. SEMPLE*, *Old-Bailey*, *July sess.* 1786. The defendant hired a postchaise for three weeks, to go a tour round the North, for the use of which it was agreed that he should pay at the rate of five shillings a day during the time that he kept it. The price of the chaise was fifty guineas, and he went away with it, this was determined to be larceny, though the contract for hiring was not for any definite time. *Leach Cr. Ca.* 3 *edit.* 469, 470. *MS.*

So in the *KING v. SHARPLESS and GREATRIX*, *Old-Bailey*, *May sess.* 1772. The prisoner left a note at a hofier's shop, desiring that he would send some silk stockings to his lodgings to look at, and looked out three pair, and went away with them, while the hofier, by his desire, went home to fetch other goods, and on this evidence he was adjudged guilty of larceny; and the JUDGES held the conviction right, for the whole of the prisoner's conduct manifested an original and preconcerted design to obtain a tortious possession of the property, and there was not a sufficient delivery to change the possession. *Leach Cr. Ca.* 108, 109. 1 *Show.* 55.

So in the *KING v. AICKLES*, *Old-Bailey*, *Jan. sess.* 1784. Indictment for stealing a bill of exchange. It appeared in evidence, that the prisoner undertook for the prosecutor, to procure for him cash for a bill of exchange for one hundred pounds, and by that means got the bill into his possession, with which he absconded and appropriated the value of the bill to his own use. The prisoner's counsel argued, that to satisfy the definition of larceny, the

the property must be taken from the *possession* of another; but the taking of the property after it is once separated from the legal possession of its original owner, cannot support an allegation of larceny, especially if the separation be unaccompanied by those ingredients which constitute a felonious intention. There is a distinction between actions committed *animo furandi* and those by *artful contrivance*, and on this depends the great distinction between *felony* and *fraud*. In the present case there was no evidence of fraud, much less of felony, it could be no more than a breach of trust, or violation of confidence. On the other side, cases were cited to shew, that if the possession was obtained with *intent to steal*, the delivery will not alter the possession. The court left the case with the jury to consider, *first*, whether they thought the prisoner had a *preconcerted design* to get the note into his possession, with an *intent to steal* it? *secondly*, whether the prosecutor intended to part with the note to the prisoner without having the money paid before he parted with it. The JURY found the affirmative of the first question, and the negative of the second, and concluded the prisoner was guilty, and the twelve judges were of opinion with the jury, that the prisoner was guilty of felony. *Leach's Cr. Ca. 3 edit. 340. MS.*

So in the KING v. JOHN PATCH, *Old-Bailey, February sess. 1782*. The evidence was, that the prisoner, pretending to find a diamond ring of great value, obtained from the prosecutor a delivery of money as his portion of the value of the ring; the money being so obtained, with a design to take it away, under the false pretence that the ring was of great value, was a felonious taking from the possession of the owner. *Leach's Cr. Ca. 3 edit. 273, 274. MS. 354, 652, 730.*

And in the KING v. HORNER, where the evidence was, that the prosecutor decoyed the prisoner into a public house, and introduced the play of cutting cards, and then under pretence of having won, swept the prosecutor's money into his hand and ran away with it. This was held a felonious taking. *Cald. Rep. 295.*

So in the KING v. WILKINS, *Old-Bailey, April sess. 1789*. The evidence was, that a tradesman delivered a parcel

parcel of goods to his servant to carry to his customer, and the prisoner contrived to meet the servant on his way, and on pretence that he was going, by the directions of the customer to the master's shop, to fetch this parcel in lieu of another, obtained the delivery of it by exchanging it for a parcel of rags of no value, which he had purposely with him, it was determined by the JUDGES to be a felonious taking of the property from the possession of the master. 1 *Hawk. P. C. ca. 33. sec. 22. 7 edit.*

Rule the Seventh.

But if it appears in evidence that the horse, chaise, or other property, was fairly and *bona fide* hired, or that the goods were really sold, and a credit given to the party, or that the person actually played at cards on his own account and lost the money, the property in such cases is *changed*, and the possession of it out of the first owner, and therefore the *fraudulent conversion* of it afterwards cannot be felony; for to constitute larceny the *felonious design* must *exist* at the time the property was obtained.

This rule is illustrated in the *KING v. CHARLEWOOD, Old-Bailey, Febr. sess. 1786.* And the *KING v. NICHOLSON*, and others, *Old-Bailey sess. 1794. Leach's Cr. Ca. 456, 457, 458.*

Rule the Eighth.

The word "*asportavit*" is necessary in every indictment for larceny; therefore there must be evidence of a *carrying away*. But proof of any the least removing of the thing taken from the place where it was before, is sufficient for this purpose, though it be not quite carried off. 1 *Hawk. P. C. ca. 33.*

Upon this ground, the guest who having taken off the sheets from his bed, with an intent to steal them, carried them into the hall, and was apprehended before he could get them out of the house, was adjudged guilty of larceny. *Ibid. 3 Inst. 108. 2 Vent. 215. 7 Ass. 39. B. Cor. 107. 3 Inst. 109. 1 Hale P. C. 508. Dalis*

21. *Crem. 36. The King v. Clement Simpson. Lent ass. Cambr. 16 Car. 2. Kelyng 31. in point.*

So also he, who having taken a horse in a close, with an intent to steal him, and being apprehended before he could get out of the close, was held to be a felon. *Dalt. 501. Kelyng 31.*

So in the *KING v. MARTIN, Lent ass. Northampton, 1777.* It appeared in evidence, that the prisoner had pulled the wool from the bodies of sixteen lambs, whilst they were living; and in some places had torn the skin away. This removal of the wool from the lambs having been found *animo furandi*, the judges ruled it to be felony. *Leach's Cr. Ca. 3 edit. 205.*

So he who intending to steal plate, takes it out of a trunk and lays it on the floor and is surprized, this is evidence of asportation, and is felony. *Kelyng 31. 1 Hale P. C. 508.*

So in the *KING v. COSLET, Old-Bailey, February sess. 1782.* The evidence was, that the prisoner got into the prosecutor's waggon, and laid hold of a parcel of currants, and had got near the tail of the waggon with them when he was apprehended. The jury found him guilty; but the court doubted whether this was a sufficient *asportation* to constitute larceny. The judges were unanimous, that as the prisoner had removed the property from the spot, it was a sufficient *taking and carrying away* to constitute the offence. *Leach's Cr. Ca. 3 edit. 271, 272. MS.*

And in the *KING v. LAPIER, Old-Bailey, May sess. 1784.* It was held, on a reserved case, by all the judges, that to force an ear-ring from the ear of a lady, so that it falls into her curls, is a sufficient carrying away to constitute larceny. *Leach's Cr. Ca. 3 edit. 360, 361. MS.*

But where a man was indicted for stealing the contents of a bale of goods in a waggon, and the evidence was, that he had set it on its end, but had not removed it from the spot; it was ruled by the judges that was not a sufficient carrying away. *Leach's Cr. Ca. 3 edit. 272.*

NOTE. Whatever evidence will support an indictment for grand larceny, will be sufficient to convict on a charge of petit larceny.

CHAPTER XX.

Of mixt or complicated Larceny from the person, which is of two kinds.

A FELONIOUS and violent taking away from the person of another, goods or money to any value, or putting him in *fear*, which is called robbery; but where there is no putting in fear is called LARCENY from the person.

Rule the First.

To satisfy the word *cepit* in an indictment, there must be evidence of a taking away.

He therefore who receives the money of another, whilst under the terror of an assault; or afterwards, while the party thinks himself bound in conscience to give it to the assailant, by an oath to that purpose, which *in fear* he was compelled to take, is a taking as complete in contemplation of law, as if with his own hand he had taken it out of the party's pockets. 1 *Hawk. P. C. ca. 34. Dalt. ca. 100. Crom. 34. 44 Ed. 3. 14. 4 Hen. 4. 3.*

Rule the Second.

Neither can he who has once actually completed the offence, by taking the goods in such manner into his possession, afterwards purge it by any redelivery. 3 *Inst. 60.*

As in the *KING v. PEAT, Old-Bailey, December sess. 1781.* The evidence was, that the prisoner stopped the prosecutor on Finchley-common, and demanded his money.

ney. The prosecutor delivered his purse. The prisoner immediately returned it again, saying, "If you value your purse you will please to take it back and give me the contents." The prosecutor received the purse back, but while taking out the money, and before redelivery, a servant leaped from behind the carriage and secured the prisoner. A doubt arose, whether as robbery is only an aggravated species of *larceny*, there was a sufficient species of *asportation* in this case to constitute the offence. But the court held, that although the prosecutor did not eventually lose either his purse or his money, yet as the prisoner had in fact demanded his money, and under the impulse of that threat and demand the property had been once taken from the prosecutor by the prisoner, it was in strictness of law a sufficient taking to complete the offence, although the prisoner's possession had continued for an instant only, *Leach. Cr. La.* 3 edit. 266, 267.

For the outrage offered to the rights of society does not vary in its nature, because ineffectual in its consequences: and the continuance of the property in the possession of the robber is not required by law. *Eden's Prin. Pen. La.* 286. 3 *Inst.* 69. *Staun. P. C.* 27. 1 *Hale, P. C.* 533.

Rule the Third,

But he who attacks me in order to rob me, but does not take my goods into his possession, though he go so far as to cut off the girdle of my purse, by reason whereof it falls to the ground, is not guilty of robbery; but punishable for a breach of the peace. 1 *Hawk. P. C. ca.* 34. 1 *Hale. P. C.* 532. *Dalt.* 100. *Crompt.* 34. But "to assault another with an intention to rob him," is now felony. *St. 7 Geo. 2. ca.* 21. *Irish.* 21 *Geo. 2. ca.* 12. *Stat. at large*, vol. 4. p. 856. *Post. Vide Index*, ASSAULT.

Rule the Fourth.

In some cases there may be legal evidence of robbery where in truth the defendant never had any of the loser's goods in his possession. 1 *Hawk. P. C. ca.* 34.

As where I am robbed by several of one gang, and one of them only takes my money; in which case, in judgment of law, every one of the company shall be said to take it, in respect to that encouragement which they gave to one another through the hopes of mutual assistance in the enterprise. Nay, though they miss of the first intended prize, and one of them ride from the rest and rob a third person in the same highway without their knowledge, out of their view, and then return to them, all are guilty of robbery, for they came together with an intent to rob, and to assist one another in so doing. *1 Haw. P. C. ca. 34. 1 Hale's P. C. 533, 534, 337.*

Rule the Fifth.

To support an indictment for larceny from the person, the evidence must not only amount to a taking away, but must shew the taking to be from the person.

And under this rule, not only the taking away a horse from a man whereon he is actually riding, or money out of his pocket, but also the taking of any thing from him *openly* and before his face, which is under his immediate and personal care and protection, may properly be said to be a taking *from the person*. And therefore he who having first assaulted me takes away my horse standing by me; or having put me *in fear*, drives my cattle in my presence, out of my pasture, or takes up my purse, which in my fright I cast into a bush, or my hat which fell from my head, or robs my servant of my money before my face, may be indicted as having taken such things from my person. *1 Hawk. P. C. ca. 34. 1 Hale, 533. S. P. C. 27. Cromp. 34, 35. Dalt. c. 100. 3 Inst. 69. Styles, 156. Salk. 613. Carth. 145. Strange, 1015.*

Rule the Sixth.

The taking must appear to be *subsequent* to the fear, for fear is the distinguishing ingredient between robbery and other larcenies. *2 Inst. 68. 2 Roll. 154. 1 Hale, P. C. 535.*

So ruled in the KING v. RICHARD MOSS, *Old-Bailey, May sess. 1784.* In evidence it appeared that the defendant

dant clandestinely stole a purse, and, on its being discovered in his custody, denounced vengeance against the owner if he spoke of it, and then rode away. The court held this taking to be *simple larceny* only, and not robbery, because the *fear* excited by the menaces of the prisoner was subsequent to the stealing.

So where several men find another apparently intoxicated, and swearing he shall go home, they drag, abuse, kick him, and clandestinely take his money, this is not robbery; for no demand is made of money, nor any fear excited for the purpose of obtaining it. 1 *Hawk. P. C.* 7 edit. vol. 1. 235.

Rule the Seventh.

The evidence must shew that the taking was *violent*, and therefore whenever a person assaults another with such *circumstances of terror* as put him into fear, and cause him by reason of such fear to part with his money or other property, the taking thereof is *robbery*; whether there were any weapon drawn or not, or whether the person assaulted delivered his money or goods upon the other's command, or afterwards gave it to him upon his ceasing to use force, and begging alms: for he was put into fear by his assault and gives him his money or goods to get rid of him. 1 *Hawk. P. C.* ca. 34. 1 *Hale's P. C.* 533, 534. *Crompt.* 34. *Dalt.* ca. 100.

So in the *KING v. GASCOIGNE*, *Old-Bailey*, *October sess.* 1783. It was ruled, that if a constable, &c. by means of hand-cuffs or other violence, extort money from a prisoner in his custody, this is robbery. *Leach Cr. Ca.* 3 edit. 313. 44 *Edw. 3.* pl. 14. 4 *Hen. 4.* pl. 3. *Staunf.* 27. *Kelyng* 43. 1 *Hale's P. C.* 507.

So as in the *KING v. LAHIER*, *Old-Bailey*, *May sess.* 1784. To snatch an ear-ring from a lady's ear, so that the ear is thereby torn through, is such a taking by violence as constitutes robbery. *Ibid.* 360. *Ante* 593.

But, as in the *KING v. BAKER*, *Old-Bailey*, *Dec. sess.* 1783. To snatch a bundle of goods from the hands of another, so that no struggle be made to keep them, is not such a taking with force and violence as will constitute robbery. *Leach Cr. Ca.* 3 edit. 324.

And

And as in the *KING v. KNEWLAND*, *Old-Bailey*, Jan. *sess.* 1796. To obtain money by a threat to send for a constable, to take the party before a magistrate, and from thence to prison, is not robbery; for the threat of legal imprisonment is not sufficient alarm to induce a person to part with property. *Ibid.* 835.

Rule the Eighth.

But it is not necessary that the fact of *actual fear*, should either be laid in the indictment, or be proved upon the trial; it is sufficient if the offence be charged to be done *violenter et contra voluntatem*.

Foster quotes the above as an opinion of lord *Holt's*, to which he implicitly accedes; and asks, suppose the true man is knocked down, without any previous warning to awaken his fears, and lieth totally insensible while the thief rifeth his pockets, is not this a robbery? Yet where is the circumstance of actual fear? Or, suppose the true man maketh resistance, but is overpowered, and his property taken from him, by mere dint of superior strength, this doubtless is a robbery. And in cases where the true man delivereth his purse without resistance; if the fact be attended without those circumstances of *violence and terror*, which in common experience are likely to make a man part with his property for the safety of his person, that will amount to a robbery. And if fear be a necessary ingredient, the law in *odium spoliatoris*, will *presume fear*, where there appeareth to be so just a ground for it, *Fost.* 128, 129. 4 *Blackf. Comm.* 243.

Rule the Ninth.

And if it appear upon evidence, that the taking from the person was attended with those circumstances of violence and terror, which in common experience are likely to induce a man to part with his property, against his consent, either for the safety of his person, or the preservation of his character and good name, it will amount to a robbery.

So in the *KING v. DONNALLY*, *Old-Bailey*, *February sess. 1779*. The honourable *Charles Fielding* gave in evidence a series of facts, from which it appeared, that the prisoner meeting him in the street demanded a present, adding, "you had better comply, or I will take you before a magistrate, and accuse you of an attempt to commit an unnatural crime." The jury found the prisoner *guilty*; and said they were satisfied "that Mr. *Fielding* delivered his money through *fear*, and under apprehension that his life was in danger." The question, "whether this offence amounts to robbery," was submitted to the *twelve JUDGES*. *Counsel* were heard, and the *JUDGES* were unanimously of opinion, that the prisoner was guilty of robbery and properly convicted. *Leach Cr. Ca. 3 edit. 229. Jones's ca. ibid. 164. Hickman's ca. ibid. 310.*

Rule the Tenth.

If the indictment charge the robbery to have been committed in the king's high-way, and it appears, on evidence, to have been committed in a private footpath, or any other place, the offender shall have his clergy; notwithstanding the *stat. 23 Hen. 8. ca. 1. Irish, 11 Jac. 1. ca. 3. 1 Stat. at large 437. The King v. Stokeman. Old-Bailey, May sess. 1718. 1 Hawk. P. C. 7 edit. ca. 34. sec. 3. Moor 16. 2 Hale, P. C. 349.*

CHAPTER XXI.

Of Evidence to support an indictment for feloniously taking Money, Goods, or Chattles from the person of any other, privately, without his knowledge. Stat. 8 Eliz. ca. 4.

Rule the First.

As this statute was intended to suppress a certain species of dexterity against the success of which the common vigilance of mankind was found inadequate; therefore

fore if the larceny is in the slightest degree discovered at the time it is committing, the offender is not within the penalty of the act.

Rule the Second.

Also when it appears in evidence that the person losing his property was so intoxicated by liquor as to be altogether senseless, the offender shall have his clergy. *The King v. Gribbe, Leach, Cr. Ca. 3 edit. 275: The King v. Mary Reading, ibid.*

Rule the Third.

Though the contrary was formerly held, yet the judges have recently ruled that privately stealing from the person of a man while he is asleep is within the statute, and takes away clergy.

As where the prosecutor a master of a ship was robbed in his cabin while he was asleep privately and without his knowledge. So where a waggoner was sleeping in the stable of an inn yard. *Thompson's case, Leach, Cr. Ca. 498. Williams's case, ibid. 558. and the King v. Furnace, Old-Bailey, July sess. 1792.*

CHAPTER XXII.

Of Evidence to support an Indictment for Burglary, which is the feloniously breaking and entering the Mansion-house of another, or the Walls or Gates of a Walled Town in the night, to the intent to commit some Felony within the same, whether the felonious intent be executed or not. 1 Hawk. P. C. c. 38. 1 Hale P. C. 549. 3 Inst. 63. 4 Blackf. Comm. 223.

Rule the First.

THE word "*noncantor*" is necessary in an indictment for this offence, and it cannot be satisfied in a legal sense,

sense, if it appear upon the evidence, that there was so much day-light at the time, that a man's countenance might be discerned thereby. *Dalt. c. 151. 1 Hawk. P. C. ca. 38. S. P. C. 30. 3 Inst. 63. Saville 47. Cromp. 32, 33. 7 Co. b. 34. 1 Hale P. C. 550. 9 Co. 66. 4 Bl. Com. 224. Cro. Eliz. 583. Fuffes's case.*

Rule the Second.

So also to complete this offence, there must be evidence not only of an *entry* but of a *breaking*; for the words "*fregit*" and "*intravit*" being both of them precisely necessary in the indictment, both must be satisfied; and a *fortiorari* therefore there can be no burglary where such evidence is wanting, as if upon the bare assault upon a house the owner throw out his money. *Dier 99. S. P. C. 30. 3 Inst. 64. 1 Hale's P. C. 551. 556. Cromp. 31. Dallison 22. Pult. 132. Fost. 108. 1 Hawk. P. C. ca. 38.*

Rule the Third.

Evidence of such breaking as is implied by law, in every unlawful entry on the possession of another, and will maintain a common indictment or action of trespass, *quare clausum fregit*, will not satisfy the words *felonice burglariter fregit*, except in some special cases, in which it is accompanied with such circumstances as make it as heinous as an actual breaking. *1 Hawk. P. C. ca. 38. 1 Hale P. C. 508, 527, 551.*

Thus, if a servant in the house, lodging in a room remote from his master, in the night time draweth the latch of a door to come at his master's chamber, with an intent to kill him. This, on special verdict, agreed by all the judges to be burglary. *Kelyng 67. and Vide Bayner's case, ibid. and Poph. 84. S. C. Hutton 20. Dyer 99.*

From the above rule it follows, that if one enter into a house by a door which he finds open, or through a hole which was made there before and steals goods, or draw any thing out of a house through a door or win-

dow, which were open before, or enter into a house by the doos, open in the day time, and lie there until night, and then rob and go away without breaking any part of the house, he is not guilty of burglary. 1 *Hawk. P. C. ca. 38.* 1 *Anderf. 114, 115.* *Saville 59.* *Fost. 107.*

But it is certain he would have been guilty thereof, if he had opened the window, or unlocked the door, or broke a hole in the wall, and then entered, &c. Or having lain in the house, by the owner's consent, he had but unlatched a chamber-door, or if he had come down by the chimney, for that was inclosed as much as the nature of the thing would bear. *Fost. 107.*

On the principle of the above rule it hath been resolved, that where divers persons came to a house with an intent to rob it, and knocked at the door, pretending to have business with the owner, and being by that means let in, rifled the house, they were guilty of burglary.

So in *LE MOTT's* case; thieves came with an intent to rob Mr. Justice *Wilde*. Finding the door locked, pretending they came to speak with him, a servant opened the door, and they entered the house and robbed. This being in the night, it was adjudged burglary; for the intention being to rob, and getting the door open by a *false pretence*, this was *in fraudem legis*, and was in law an actual breaking. *Kelyng 43.*

So on argument by the *Attorney-general (Toler)* and *Mac Nally* for the crown, and *Jonah Green* for the prisoner, it was ruled, that procuring the door to be opened in the night, by pretence of having a letter to deliver, or by any other device, if there be evidence to shew a preconcerted plan or intent to rob the house by that means, is burglary; though the party so entering be apprehended on entering the house by persons waiting within side specially for that purpose. *Commiff.oyer and terminer, Dublin, 1799.*

So if men pretend a warrant to a constable, or cause the *bue and cry*, and bring him along with them, and under that pretence rob the house, if it be in the night this is burglary. *Ibid.* 1 *Hale's P. C. 552.* 3 *Inst. 64.*
And

And also in the *KING v. CASEY and COTTER, Old-Bailey sess. October, 1666*, it was ruled, that persons taking lodgings and robbing the landlord at night, is burglary; for the law will not endure justice to be defrauded by evasions. *Kelyng 52, 63.*

Rule the Fourth.

As to the entry, it seems that evidence of any, the least entry, with the whole, or with but part of the body, or with any instrument or weapon, will satisfy the word "*intravit*," in an indictment for burglary. *Dalt. 151. Kelyng 67. 1 Hale's P. C. 553, 555. 4 Blackf. Comm. 245. 1 Hawk. P. C. ca. 38.*

The *KING v. GEORGE GIBBONS, Old-Bailey, June sess. 1752, is in point.* It appeared in evidence, that the prisoner, in the night time, cut a hole in the window shutters of the prosecutor's shop, which was part of his dwelling-house, and putting his hand through the hole took out watches; but no entry was proved otherwise, and this was holden burglary. *Fost. 107, 108.*

So proof that one do put his foot over a threshold, or his hand, or a hook, or pistol within a window; or turn the key of a door which is locked within side; or discharge a loaded gun into a house, it is evidence of an entry. *1 Hawk. P. C. ca. 38.*

Rule the Fifth.

But the instrument must be introduced for the special purpose of committing the felony.

Therefore in the *KING v. JOHN HUGHES, and others, Old-Bailey, Decemb. sess. 1785.* It appeared in evidence, that the prisoner had bored a hole with an instrument called a *centre bit*, through the pannel of the house door, near to one of the bolts by which it was fastened, and that some pieces of the broken pannel were found within side; but it did not appear that any instrument, except the point of the *centre bit*, or that any part of the prisoners bodies had been within side the house, or that the apperture made, was large enough to admit a man's hand.

The COURT were clearly of opinion, that this was a sufficient *breaking*; but there must be both a breaking and an entering to constitute the burglary, and the breaking must be such as will afford the burglar an opportunity of entering so as to commit the intended felony, or of introducing some part of his body, or some instrument proper for committing the felony. *Leach's Cr. Ca.* 3 ed, 452.

Rule the Sixth.

In some cases a man may be guilty of burglary, who never made any actual entry at all.

As where divers come to commit a burglary together, and some stand to watch in adjacent places, and others enter and rob, &c. for in all such cases, the act of one is in judgment of law the act of all: it was a common cause with them, each man operated in his station, at the same instant, towards the same common end, and the part each man took, tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise. 1 *Hawk. P. C. ca.* 38. 1 *Hale's P. C.* 439, 555. *Kelyng* 111. *Crompt.* 32. *Fost.* 350, 353.

It has also been determined in the *KING v. JOSHUA CORNWALL*, *Mich.* 4 *Geo.* 2. that a servant who confederating with a rogue lets him in to rob a house, &c. is guilty of burglary, as much as the rogue himself. 1 *Str.* 881. *Dalt.* 151. 1 *Hale* 555. 1 *Hawk. P. C. ca.* 38. 10 *St. Tr.* 433. *S. C.*

Rule the Seventh.

It is enacted, "That if any person shall enter into the
" mansion, or dwelling house of another, by day or by
" night, without breaking the same, with an intent to
" commit felony, or being in such a house, shall com-
" mit any felony, and shall in the night time break the
" said house, to get out of the same, such person is, and
" shall be taken to be guilty of burglary, and ousted of
" the benefit of clergy, in the same manner as if such
" person had broken and entered the said house in the
" night

"night time, with an intent to commit felony there."
Stat. 12 Anne ca. 2.

With regard to cupboards, presses, &c. they being merely moveables, breaking them is not evidence of burglary. *Fost. 109.*

Rule the Eighth.

Whatever kind of entry will make a man guilty of burglary at common law, will be sufficient evidence to bring the case within the statutes against house-breaking, attended with larceny in the day time. *Stat. 1 Edw. 6. ca. 12. sec. 10. 39 Eliz. ca. 15. Fost. 108.*

CHAPTER XXIII.

Of Evidence necessary to support an Indictment for ARSON, or the maliciously and voluntarily burning the House of another, by night or by day.

Rule the First.

NEITHER evidence of the bare *intention* to burn a house, nor even an actual *attempt* to do it, by putting fire to part of a house, will amount to felony, if no part of it be burnt, for the indictment must have the words, *incendit et combussit*. But if any part be burned, though the fire afterwards go out, or be put out, it supports the indictment. 1 *Hawk. P. C. ca. 39.* 1 *Hale's P. C. 570.* *Dalt. 105.* 3 *Inst. 66.* 4 *Blackf. Comm. 222.*

Rule the Second.

The house described in evidence, must be the same kind as that named in the indictment.

Therefore in the *KING v. SARAH TAYLOR, Lent ass. Rochester, 33 Geo. 2.* The prisoner was indicted for having burned a certain out-house, called a *paper-mill*, and it appeared that only a large quantity of paper that was drying on a loft, annexed to and belonging to the mill was set fire to, but that no part of the mill was set fire to or consumed, the evidence was held insufficient. *Leach Cr. Ca. 3 edit. 58.*

CHAPTER

CHAPTER XXIV.

Of Evidence to support the charge of a crime against Nature; of Rape; of having carnal knowledge of an Infant; and of forcible Marriage.

Rule the First.

IN every indictment for sodomy or bestiality, there must be the words *rem habuit veneream, et carnaliter cognovit*; wherefore to make a rape there must be an actual penetration, or *res in re* proved, as also in buggery. Therefore *emissio seminis* is indeed an evidence of penetration, but singly of itself, it makes neither rape nor buggery, but it is only an attempt of rape or buggery. 3 *Inst.* 59.

HALE, says, but the *least* penetration maketh it rape or buggery; although there be not *emissio seminis*, and therefore lord Coke must be wrong, and contradicts what he says in his Pleas of the Crown; and besides, it is possible a rape may be committed by some *quibus virga erecto adfit et emissio seminis ex quodam defectu desit*. 1 *Hale's P. C.* 630.

Rule the Second.

Of late years it has not been customary to press a woman to give evidence of the above particulars; and it has been held sufficient if the prosecutrix swear, that the defendant had carnal knowledge of her person, against her consent; or carnal knowledge of her body as her husband had. *The King v. Lidwell, Esq. Spring ass. Naas, 1800*, before lord CARLTON, C. J.

Rule the Third.

It is strong, but not a conclusive presumption against the prosecutrix, that she made no complaint in a reasonable

sonable time after the facts. 1 *Hawk. P. C. ca. 41.*
Pulton 134. 1 *Hale P. C. 630.* *Rushw. Coll. part 2. 100.*

Rule the Fourth.

But offences of this nature are not mitigated, by shewing that the woman at last yielded to the violence; if such her consent was forced by fear of death, or of dures. *Dalt. ca. 105, 607.* 1 *Hawk. P. C. ca. 41.*

Rule the Fifth.

Neither is it an excuse that she consented after the fact; or that she was a common strumpet; for she is still under the protection of the law, and may not be forced. But it was anciently said to be no rape, to force a man's own concubine. 1 *Hawk. P. C. ca. 41.* 1 *Rushw. Coll. part. 2. 100.* *Braet. 147, 148.*

Rule the Sixth.

On an indictment upon the statute, "that whoever shall unlawfully and carnally know and abuse any woman child, under the age of ten years, shall suffer as a felon, without clergy," evidence of consent by the child is not material; but it must be proved that the defendant entered her body. And her age must be proved. (The age twelve.) 1 *Hawk. P. C. ca. 41.* *Crown Cir. Comp. 7 edit. 659.* 3 *Burr. 1696.* *Thirkell's case. Cro. Car. 332.* *Martin Page's case. Vide Infant, Ante 149.* *Stat. 18 Eliz. ca. 7. Irish. 9 Ann. ca. 6. sec. 2.*

For evidence by the woman forced to marry. *Vide Ante 179.*

CHAPTER XXV.

Evidence of sending a threatening Letter.

IT has been ruled in the *KING v. GIRDWOOD, Old-Bailey, February sess. 1776*, that if a person deliver a threatening

threatening letter to a common porter or message-carrier, desiring him to put it into the post-office, it is *evidence* that the person who delivered it knew of its contents, although the letter was sealed at the time it was so delivered. *Leach. Cr. Ca. 3 edit. 169.*

So in the same case it was also *ruled*, that if a letter of this description be couched in ambiguous terms, the question whether the words it contains amount to evidence of a threat, may be referred to the consideration of the jury. *Ibid.*

CHAPTER XXVI.

Of Evidence to support an Indictment for an Assault and Battery, and for aggravated Assaults.

Rule the First.

EVIDENCE of an *attempt* with force and violence to do a corporal hurt to another, supports the indictment.
1 *Hawk. P. C. ca. 62.*

As by striking at the person with or without weapon. Presenting a gun within the distance it can carry; pointing a pitchfork, &c. holding up the fist, or other such act, in an angry and threatening manner. *Ibid.*

Rule the Second.

Evidence of the smallest injury done to the person of a man, in an angry, revengeful, rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, constitutes a battery, in contemplation of law. *Ibid.*

Rule the Third.

When a man, in his own defence, beats another who assaults him, &c. he may give the previous assault in evidence

dence as a justification; unless the blow be in a church or church-yard, &c. *Ibid.* 6 *Mod.* 172, 230, 263. 4 *Blackf. Comm.* 145, 216. 11 *Mod.* 43, 52. 2 *Salk.* 642. 1 *Lord Raym.* 177. 1 *Siderf.* 246. *Holt* 699. *Cro. Jac.* 307. *Cro. Car.* 467. *Wynne's Eunomius*, vol. 3. 46, 47.

Rule the Fourth.

It is enacted, that if any person, with an offensive weapon or instrument, unlawfully and maliciously shall assault; or shall by menaces, or in or by any forcible and violent manner, demand any money, goods, or chattles, of or from any person or persons, with a felonious intent to rob, he shall be transported. *Stat. 7 Geo. 2. ca. 21. Irish.* 21 *Geo. 2. ca. 12.* 6 *Stat. ut large* 856.

On which statute it has been ruled, that to complete the crime, not only an *assault*, as by holding a pistol towards a coachman, and telling him to stop, but a demand of the money or other property, must be proved. 1 *Hawk. P. C. ca. 55.* *Peter Parfait's case*, *Old-Bailey*, *sess.* 1740. *Howard's case*, *Old-Bailey*, 1783. *Leach Cr. Ca. 3 edit.* 23.

Rule the Fifth.

The evidence must shew, that both the *assault* and the *demand* were made upon the person intended to be robbed. *Thomas's case*, *Old-Bailey*, *July sess.* 1784. *Leach Cr. Ca. 372.*

Rule the Sixth.

The evidence must shew, that the assault was made with an offensive weapon, of the same kind as that which is laid in the indictment: or that a demand was made of goods. *Jackson's case*, *Old-Bailey*, *April sess.* 1783. *Leach Cr. Ca. 3 edit.* 303. *The King v. Remnant*, 5 *Term. Rep.* 169.

CHAPTER XXVII.

Of Evidence admissible to support an Indictment for a Conspiracy, of High Treason, or Conspiracies to commit other Offences.

Rule the first.

EVIDENCE may be given of a treasonable conspiracy, at any time *before* or *after* the day alledged in the indictment.

As in the KING v. CHARNOCK, and KEYS, *Old-Bailey, March, 8 Will. 3. 1695*, before HOLT, C. J. and TREBY, C. J.

Charnock, one of the prisoners, objected to evidence being received of any fact done the *preceding* year, as nothing was mentioned in the indictment of that year.

HOLT, C. J. The day is *not material*, it is only a circumstance, but in *form* some day before the indictment is preferred must be laid; and though the day laid in the indictment is the tenth of February, yet it is also said, that the things contained in the indictment were done likewise at divers days and times, as well before as after; and so the indictment comprehends even what might be done the last year as well as this. Neither are the witnesses tied up either to the particular *time* or *place* mentioned in the indictment, so it be *within the county*, and *before* the indictment preferred. All that is to be regarded is, that no evidence can be given or admitted, of any other species of treason, but what is contained in the indictment; for a man may certainly be indicted for a treason committed *this* year, and upon his trial evidence may be given of the *same* treason committed the year before. And the reason is good, for the treason consisting in imagining and compassing the king's death, which may be manifested by diverse overt-acts, some *before*, some *on*, and others *since*, the tenth of February, (the day laid) yet they are evidence of *one* treason, which

which is the compassing the king's death. It matters not how far back the conspiracy reaches, or did begin, if it was afterwards pursued, proof may be given of it; and this is not unusual, and the common law is plain on it. 4 *St. Tr.* 570. *Ante* 496.

Rule the Second.

The existence of a conspiracy being proved, the act of any one man engaged in such conspiracy, though *not* on his trial, is evidence to criminate those with whom he co-operated, though they are not on trial.

But the *declarations* of a person unconnected with the defendant on trial, except as he may at particular occasion be in his company, cannot in any case be received in evidence.

In lord STRAFFORD's case, 32 *Car.* 2. the evidence was arranged in two parts, *general* and *particular*. The general evidence to shew the universal conspiracy; the particular to shew what special part the prisoner had in that conspiracy. Accordingly witnesses were produced, first to prove the existence of the plot charged in the impeachment, and were permitted to state facts of the conspiracy that took place both in England and abroad; and the existence of the conspiracy being thus established, then, facts personally applicable to the prisoner were given in evidence. 3 *St. Tr.* 109.

So in lord LOVAT's case, 20 *Geo.* 2. 1746-7. The first class of evidence was arranged to shew the scheme of rebellion began and carried on, for bringing over the Pretender, by aid of foreign force; the second included evidence of the more immediate scene of action, and the *particular* part the prisoner took in it. 9 *St. Tr.* 615, 630.

In the KING v. THOMAS HARDY, high treason, *sessions-house*, Old-Bailey, October and November, 39 *Geo.* 3. James Davidson, a printer, deposed that Mr. Thelwell, (indicted for treason with Hardy, but not on trial) brought a manuscript to him and desired him to print it.

Erskine, for the prisoner, objected, that what Thelwell said was not evidence against Hardy.

Garrow insisted, that after having proved a connection and conspiracy between *Thelwell* and the prisoner, all the acts of *Thelwell*, or any other person against whom evidence had been given, of accession to the general plan of conspiracy, was clearly evidence against every man charged with that conspiracy.

Erskine admitted there was no doubt that upon an indictment for a conspiracy, be the conspiracy to do one act or another, or be the quality of the act done, when it is done, what it may, that as far as persons are connected acting together towards one purpose, which purpose constitutes the crime, they may be involved together by evidence; but that is not the question here, and the court will not allow it to be asked, whether *Thelwell* did direct him to print that paper, *Hardy* not being present.

ERRE, C. B. said, This purports to be a paper containing a resolution at a general meeting of the London Corresponding Society; it is brought to the printer by one of the members of that society, the prisoner being another member of that society, acting in that society as the secretary, and this being a printed paper produced by one of them, it does seem to me that in a general charge of a conspiracy, this is evidence to prove a circumstance in that conspiracy: whether it will be ultimately so brought home to the prisoner *Hardy*, as that he should be responsible for the guilt of having published it, may be another consideration; but that it is a branch of the conspiracy, and a circumstance occurring in it, the import of the paper plainly proves. *Hardy's trial*, (*Gurney's edit.*) vol. 1. 345, 6 & 7.

In the same case, *Garrow* submitted that having proved *Thelwell* a member and agent of the Corresponding Society, the crown was entitled to give in evidence against *Hardy* a letter from *Thelwell*, purporting to have contained several of the societies addresses and seditious songs composed and sung by *Thelwell* at their meetings; and that any act of *Thelwell's* so in furtherance of the conspiracy, was evidence against the defendant.

Erskine. It appears *Thelwell* was an agent for the publication of this address, which turns out to be an act of

of the society : what an agent *does* is one thing, but what an agent *says has been done* is another thing ; therefore what *Thelwell* has said is not evidence against *Hardy*. Many may meet for objects which they may all league in and be connected together ; and if criminal, all criminal. But the *declaration* of one man, supposing he drives at any particular object, and makes use of any particular language to express his mind, with regard to that object, cannot be evidence. As far as all the acts of the society are given in evidence, as far as any thing has been said in the *presence* of *Hardy* at meetings he attended, all these are evidence against him ; and so is every thing that *Thelwell* does in this partial agency ; for he is not established to be the universal agent of *Hardy*, but only particular agent for procuring the printing of a particular paper.

Gibbs, same side.—The question is, whether *Hardy* has compassed the king's death, and whether he has done any of the acts charged in the indictment as overt-acts in the prosecution of that design. The evidence offered is, that *Thelwell*, who is in the same indictment with *Hardy*, not by any communication with *Hardy*, not in consequence of any pre-concerted scheme between him and *Hardy*, did write this letter. Now with respect to any thing that passed at the meeting at which *Hardy* was, with respect to any thing that was done by any other person directed and instructed by *Hardy* to do that thing, we admit that those things which passed at the society in *Hardy's* presence, and that any thing which was done by another person by the direction of *Hardy* could be evidence against *Hardy* ; but to what point in the indictment the letter written by *Thelwell*, which it is not proved *Hardy* ever had any knowledge of, does not appear.

The three questions are, first, whether *Hardy* compassed the king's death ; second, whether he committed any of the acts which were stated as overt-acts ; and third, whether he committed them in the prosecution of a design upon the king's life. He submitted that a letter written by *Thelwell*, without the knowledge of *Hardy*, could not be evidence of the act of *Hardy's* mind, therefore it could not be evidence on the first ground.

With

With respect to the existence of the acts that are laid as overt-acts, they must be proved specifically upon all the prisoners in the indictment. The present trial is only of *Hardy*. The present question is, whether he did any of these acts. Then the declaration of another man, whether by word of mouth or by letter, cannot prove the fact upon *Hardy*.

Then suppose the acts proved, the third thing to be proved is, that the act was done in the prosecution of a design upon the king's life; then nothing that is said, written, or done by a *third* person, without the authority of *Hardy*, can prove that *Hardy* meant to produce the effect that is imputed to him, namely the destruction of the king. Therefore this letter written by *Thelwell* does not appear to conduce to the proof of either of the three things imputed by this indictment; namely, that he compassed the king's death, that he in point of fact committed any of the acts stated in the indictment as overt-acts of that design; or supposing that he committed them, that any of these acts were directed to the design of compassing the king's death. Upon neither of these grounds is this letter admissible against *Hardy*, and therefore ought not to be received in evidence.

EYRE, C. J. C. P. I agree that where several persons are proved to be engaged in one general conspiracy, all the transactions of that conspiracy, by the different parties, may and ought to be given in evidence; and it is enough if the party accused at this time can be proved to be privy to that general conspiracy; for if that is proved, every thing that is done by the different parties concerned must be also imputed to him as a part of the transaction of that conspiracy. This letter is no more than *Thelwell's* account to a private friend of a part which he had taken respecting this paper, and of his having composed songs; and another passage in it is very material, as against *Thelwell*; but, in my mind, should be reserved until it comes to the time when *Thelwell's* own declarations come to be proper evidence.

I doubt whether we ought to consider this private letter as any thing more than *Thelwell's* declaration; and
Thelwell's

Thelwell's declaration ought not to be evidence of any thing which, though remotely connected with this plot, yet still does not amount to any transaction done in the course of the plot, for the furtherance of the plot; but is a mere recital of his, a sort of confession of some part that he had taken. That is not like the evidence which we before admitted of a fact done by *Thelwell* in carrying the papers and delivering them to the printer, which is a part of the transaction itself. His account of that transaction stands upon a different footing. It seems just the same as an act which shall bind a man because he is connected with the person that did the act; and his declaration, which shall not bind him, because it is no part of the act.

BULLER, J. There are two things to be considered in an indictment of this sort—*First*, whether any conspiracy exists; *next*, what share the prisoner took in that conspiracy. When we are considering the first question, any thing that passed from any person who is proved to be a party in the conspiracy ought to be received in evidence, and it is received for the purpose of shewing what was the *extent* and *nature* of the conspiracy. Now if the case stood merely upon this ground, that *Thelwell*, one of the conspirators, had said, their object was so and so; that would be evidence. In *Damaree* and *Purchase's* case, evidence was received of what some of the party had done when the prisoner was not present. The attorney-general says: "I call this witness, not to speak in particular of the prisoner, but to shew the *intention* of the mob." On the trial of lord *Southampton*, something said by lord *Essex*, previous to the prisoner's being there, was admitted in evidence. In lord *George Gordon's* case, evidence of what different persons of the mob had said, though he was not there, was admitted. In all the cases at St. *Margaret's-hill*, 1800, the same thing was admitted, and with a view of shewing *what was the design* then on foot, which is a very distinct question from the question of whether the prisoner was or was not concerned in the extent that others might have been. This letter seems to have that effect; for it shews what some of the parties at least *intended* by meetings they

they had held, and what they proposed to effect. In that light, therefore, it seems to be evidence. But before it can affect the prisoner materially, it is necessary to make out another point, namely, that he consented to the extent that the others did; but still while we are upon the question as to the design, any thing that has been *said*, still more any thing that has been *written* by the conspirators, ought to be received in evidence to prove what the design was:

GROSE, J. concurred with BULLER.

MAC DONALD, C. B. and HOTHAM, B. were of opinion with EYRE.

EYRE, C. J. In the cases of *Damaré* and lord *George Gordon*, the cry of the mob at the time made a *part* of the *fact* of the transaction, therefore such evidence ought to be received. Correspondence very often makes a part of the transaction, the correspondence of a man who is a party in a conspiracy, would undoubtedly be evidence; correspondence is furtherance of the plot; but a correspondence of a *private nature*, a mere *relation* of what has been done is a different thing. *Hardy's tr. (Gurney's edit.) vol. 1. 360 to 369.*

In the same case—

Garrot, for the crown, proposed to read a letter upon the principle of its being a correspondence between one of the persons proved to have been a party in the conspiracy, and another person at a distant part of the kingdom, likewise proved to be a party in the conspiracy. It was a letter from *Martin* to *Margaret*, at that time in custody in the Talbooth, *Edinburgh*, having been committed as a member of the British convention. This letter, he stated, to be in terms calculated to excite the Northern people, by the doctrines which had been disseminated in *London*.

Erskine. This is an indictment for compassing and imagining the death of the king, and there are overt-acts stated in the indictment, laid as acts to fulfil the traitorous *intention*, which is the charge upon the record. It is insisted, that these acts involve in themselves a forcible subversion of the government of the country, which
would

would involve in it, as a consequence, the death of the king, and that therefore it is an overt-act, or, in other words, relevant evidence to prove the *criminal intention*, which is the subject matter of this indictment. The law certainly permits any other *acts* of the prisoner to be given in evidence which decypher his mind, any thing he has *said*, any thing that he has *done*, which point directly and relevantly to the purpose of this indictment: but the court will ever recollect, that the crime charged upon the record, is the compassing the death of the king, and that the overt-act is the means the defendant is charged to have made use of, in the accomplishment of that criminal purpose.

Let us see the danger of allowing the letter of a man to be read, who is not charged upon this record as a conspirator with the prisoner. We say, any thing that *Martin* says or writes, can, upon no principle of common sense, be considered as evidence to criminate any body, even though he be proved a member of the corresponding society. Take him as a member for the sake of argument, upon what principle can the court go out of the overt-act charged in the indictment? upon what principle can the court go beyond evidence of the direct conspiracy charged upon the defendant, but upon this wholesome principle which we do not contradict, namely, that any thing which can decypher the mind of the prisoner to the jury, from whence they can collect that he intended the death of the king, may be evidence against him; then, according to that, any members of the corresponding society, brought together where *Hardy* was, not speaking of the king, or attempting any thing that could lead to his majesty's death, would make him answerable for every wicked thing that any man has said, or any man has written. If *Martin* expresses himself in a contemptuous manner of the king, or of his parliament, it may be evidence to decypher the mind of *Martin*, but not the mind of *Hardy*.

Where is this attempt at evidence to stop? if *Martin* is to be considered the decypherer of the mind of *Hardy*, then *Hardy's* counsel must enter into a defence of the mind of *Martin*; they must call witnesses to his character.

racter. Will you go the length of making a declaration of *Martin's* contemptuous behaviour towards the king, evidence not only to shew that he thought lightly of the king, but that every other man did, who met for another purpose and for another end?

As the prisoner stands accused of compassing the death of the king, every thing he has done himself, every thing done in his presence, every thing said in his presence, to which he may be supposed to assent, by continuing to meet the same persons again, is to be received in evidence. Suppose, instead of being a letter to *Margaret*, it had been a letter to *Hardy* himself, it would not be evidence. I cannot help a man's writing and sending a letter to me; but I may disapprove the contents, and shall this be evidence against me? if this letter be read, *Martin* of course must be allowed to explain it. If the crown can give the letter in evidence, because *Martin* happened to be a member of the London corresponding society, the correspondence of all the affiliated societies, and every man in them may be read, and the prisoner in turn, must be allowed to produce the letters of all the members of these societies. Therefore, on principle of law, this letter cannot be read, unless it be shewn that it is connected with something that *Hardy* and *Martin* have done together, and that it can be brought home to *Hardy*, that he knew the facts contained in that letter, and that it was something done in furtherance and accomplishment of a conspiracy between them.

Gibbs, adverted to the cases of *Damaree* and lord *George Gordon*, what they declared while they were in action, was admissible evidence to shew what the object of these insurrections was, and therefore it was received: but the court have never determined, that the declaration of a person unconnected with the prisoner, could, in any case, be received in evidence.

When a man is indicted for that which is done by a great assembly, and he is present at some times, and absent at others, the declarations of other men acting with him in that very act for which he is indicted, are admissible evidence to shew what the object of that assembly was: but why was the letter last offered rejected?
for

for this reason, because it contained a relation of facts which relation of facts the prisoner was not cognizant of; what is the present letter? it is no more than the last letter; it contains a relation of facts; and then they would add to it, that the object of this relation of facts, was to keep up the spirit of a person in *Edinburgh*.

That a letter should be evidence against the prisoner which he never saw; and for a purpose to which he never acceded, seems against all law, and is against all justice; for the object of this indictment is to try the mind of Mr. *Hardy*, that is, whether he did in his mind compass the death of the king.

Mr. *solicitor-general*, (*now lord Redsdale, chan. of Ireland.*) This is a declaration of conspirators, in the progress of their conspiracy. In the last case the letter was addressed to a person not shewn to be involved in the conspiracy. This letter is addressed by *Martin*, proved to be chairman of a meeting, to *Margarot*, deputy at the convention held at *Edinburgh*; it is therefore a conversation by letter, between two persons parties to the conspiracy, if a conspiracy existed.

Now for the purpose of shewing the existence of a conspiracy, and for the purpose of shewing what the views of the conspirators were, and how far they went; conversations of those conspirators, totally distinct from the prisoner, have constantly been admitted in evidence. In support of this position he cited lord *Stafford's* case. 3 St. Tr. 101. *Serjeant Maynard's* speech. *Ibid.* Lord *Loval's* case. 9 St. Tr. 616.

Though this letter is evidence *quo animo*, *Martin* acted; it is not direct evidence *quo animo*, *Hardy* acted; but it is the nature of all plots that this sort of evidence should be given; several persons are concerned; they are brought into one engagement; some of them may have views less culpable than others; but for the purpose of a jury determining the guilt of the particular person charged, the views, and the intentions, declared by conversation, especially conversations between persons concerned in the plot, which this letter is, is matter proper to be given in evidence, consistent with the last determination; and upon the very foundation, that it is what passes between persons engaged

engaged in a conspiracy, while the conspiracy is in its process towards that conclusion, which the conspirators are charged to have in view.

Adair, serjeant, *Bearcroft*, *Bower*, and *Law*, spoke on the same side.

EYRE, C. J. It has been duly stated, what the nature of this question is; namely, that if this were merely a trial for a conspiracy, this would be evidence against one of the parties in that conspiracy; because the question, whether this prisoner is to be reached upon the specific charge against him, is undoubtedly a question, whether he is to be reached by that medium, and if the medium is once established, that question arises.

In the case of a *conspiracy*, general evidence of the thing conspired is received, and then the party before the court is to be affected for his share in it; the question then is, whether a paper under the hand of a person, who is proved to be one of the conspirators, shall be received in evidence, where it is nothing more than a paper under his hand? for as this case stands, it is not a letter sent to *Margarot*. There is no proof that *Margarot* ever received such letter; and therefore it may be a paper merely written privately by *Martin*, who is the person in whose hands it is stated to be, and may never have gone out of his hands. The question is, whether under these circumstances, such a paper is to be admitted in evidence in a case, in which another person now stands at the bar; and this does not appear to be sufficiently distinguished from the case just determined, to satisfy my mind that it ought to be received in evidence.

It is undoubtedly true, that the general plot is to be made out, by proving the transactions of others, to which the prisoner may not be immediately a party; but then is it to be proved by the *mere acknowledgment* of these other parties, and so made use of against the prisoner? For instance, here is a conspiracy charged. Suppose a witness should come and say, "I heard *Thelwell*, and "*Martin*, and *Margarot*, say, that they were engaged "in such a conspiracy," that would be good evidence personally against the parties who said it, to prove against them individually, that they were concerned in that conspiracy,

spiracy, but it would be no evidence whatever against third persons. This was the case on lord *Stafford's* trial; a witness proved that he heard A. B. and C. converse upon the subject of a conspiracy; that is a direct proof, that these three persons conspired, and there the conversation of one is evidence against the other, and so on; that is, evidence of a transaction, a fact, not hearsay evidence, not evidence of a party's acknowledgment, only in as much as it is an acknowledgment by *one*, in the *presence* of *others*, they acquiescing, and therefore becomes distinct and proper evidence. But with regard to these personal acknowledgments of having meant to excite, for that is the nature of this letter, that is evidence if the party who was to be affected by it, stood at the bar to answer for it, but if another person was indicted by himself, no evidence could be received against that person but the evidence of facts, proved by the witnesses, who prove the existence of the facts in regular evidence, confessional evidence is *ad hominem* only. If it happens that a matter of fact is evidence against A. by evidence of the truth of that fact, other than the confession of A. that does also become evidence against B. from the circumstance of B. being connected in the plot, and B. being bound by all that A. has done. But the course that has been observed in the state trials has been, that *confessions* have been made evidence against the individuals only who confessed. This is of the nature of confession, and nothing more; and confession has been considered as evidence only against the party making it, and is not to be received where that party is not the person before the court. *Vide cap. Confess. Ante 37.*

MAC DONALD, C. B. On the last question I confined what I said to the exact circumstances of the case, namely, that the *bare relation* of acts by one of several persons, to whom the conspiracy is imputed, made to a perfect stranger to that conspiracy, is no more than an admission, which may possibly affect himself, but cannot possibly affect any of his co-conspirators, it not being an act done in the prosecution of that conspiracy. But this is a paper addressed by one of several conspirators, to another of those conspirators, it is introduced as subser-
 vient to the proof of the general nature and tendency of

of that conspiracy, which is alledged and endeavoured to be proved as the foundation of affecting the prisoner with a share in that conspiracy. Now one conspirator addressing a paper to another conspirator, having relation to that conspiracy, not merely a description to a stranger, is an act complete in that single conspirator, although that paper should be intercepted, or although it should never reach that person for whose perusal it was intended. That distinguishes this from the other case, it is a different act in one, though it does not reach the other, in that sense; it is an act of one of the conspirators, which, in order to shew the nature and tendency of that conspiracy, may be read against any other.

HOTHAM, B. concurred with the chief baron.

BULLER, J. In lord *William Russel's* case, lord *Howard* in his examination at large into evidence of what passed between him and lord *Shaftsbury*; and in parts of that evidence he goes on to say, that he supposed these things were told to lord *Russel*: lord *Russel* properly objects to that, he says it is hearsay, and does not affect him, but it is part of the evidence that is given, and is much relied upon by the chief justice, in summing up to the jury, with a view to the question of *conspiracy*, which is always to be distinct from the question, whether the evidence does or does not affect the prisoner. The evidence given then by lord *Howard* is, that in a conversation with lord *Shaftsbury*, he asked him what forces he had, to which lord *Shaftsbury* answered, that he had enough, and ten thousand brisk boys were ready to follow him, whenever he held up his finger.

The chief justice states this to the jury, repeating these words, as evidence of a *consult*; but that it does not affect lord *Russel*.

Then how stands this case? the first question to be made out is, that there was some conspiracy to affect the life of the king; and to make out that, you must go into evidence of what was done by other persons. That, when established, would not affect the prisoner, but is necessary to shew, that there was such a conspiracy on foot; and then go on to the second question, to see whether there is or is not evidence to prove that this prisoner

prisoner was acting a part in this conspiracy. The question will stand clearer if we suppose a conspiracy, of the nature contended for on the part of the prosecution, had gone on without the intervention of such a convention as had been proved by persons committing their resolutions to writing; if such a combination existed, how in the nature of things could it be made out but by the declarations and conversations of those who were parties to it. Suppose an equivocal expression were used, should not I prove by conversation of persons present how they understood it? It is evidence that they meant that their plan should go to such an extent; then it becomes a secondary question, whether the prisoner so understood it or not; it is an expression equivocal; and if it is proved on the part of the prosecution that some meant to go to that extent, it is open to the prisoner to say it was not so meant by me, nor did I so understand it. But the question now is not upon the effect of the evidence, but whether it ought or ought not to be received; and inasmuch as it goes to the existence of a conspiracy, it seems to me that it must be received. What effect it will have must be considered hereafter.

GROSE, J. was of the same opinion on the same ground; and added, when it is said, that this is merely a confession, or a writing, I think it is more, because we know that in many circumstances of this sort it has been determined, that *scribere est agere*, and the writing here is such an act as may shew the extent of the plan, and the intention of the parties to that plan. I am of opinion it ought to be read. And the paper was read. *Hardy's tri. by Gurney, vol. 1. from 368 to 398.*

In the same case,

Garrow proposed to read a letter from a society at Sheffield, addressed to the prisoner. No part of it was in his hand-writing, and it was found in the possession of Thelwell, who had, it appeared, ~~was~~ in some instances, an agent of that London Corresponding Society, of which Hardy was secretary.

Erskine. The principle upon which the last piece of evidence was admitted was—that it might be evidence to shew a conspiracy; yet would not go to affect the prisoner,

been,

soner, unless brought home to him. In the evidence now offered, how does it appear to be the same Sheffield society with which this society was in correspondence? It is written in the same hand-writing. Does it profess to be written by the same person who before corresponded with the prisoner?

Garrow. We do not state this is the Sheffield Society with which they corresponded; but to be from a society at Sheffield, with which town they were in correspondence, signed by a person purporting to be a secretary.

EYRE, C. B. This letter is in a different situation from the other. It is a letter purporting to come from one of these societies; it is addressed to the prisoner, and it is found in the hands of a person affected by the evidence, at least to involve him in this conspiracy. The letter was read. *Hardy's tr. by Gurney, vol. 1. 412, 413.*

In the *KING v. JOHN HORNE TOOKE*, tried on the same indictment, *Old-Bailey, Nov. 1794.* The counsel for the crown tendered as evidence the draught of an answer meditated to have been sent by *Hardy* to a letter from *Stockport* directed to him as secretary to the Corresponding Society, and found in his possession.

Erskine, for the prisoner, objected to receiving such draft in evidence on this ground, that a paper which had been found insufficient to convict *Hardy* (who had been tried and acquitted on the same indictment that charged the prisoner) ought not to be read against another person.

EYRE, C. J. The charges brought against the prisoner related to transactions in which several persons, and among others, *Hardy* were involved; and though a jury has determined that the share taken in those transactions by *Hardy* was not criminal, his acquittal did not however prevent whatever was connected with the conspiracy from being evidence against the prisoner.—Objection over-ruled. *Dublin edit. Tooke's trial, 320.*

In the same case it was admitted, that where a charge is against several for conspiring to do a certain act, and one of the persons with whom the prisoner on trial is implicated, has been acquitted, the record of that acquittal may be given in evidence on the part of the prisoner; and

and clearly the party acquitted is a competent witness.
Ibid.

In the KING v. JAMES WELDON: *Commis. Oyer and Terminer, Dublin, December, 1795*, tried and convicted of treason in compassing the death of the king.

On an objection by *Curtain* and *Mac Nally* for the prisoner, answered by *Fitzgerald*, prime serjeant:

CHAMBERLAIN, J. and GEORGE, B. held that it being once established that a treasonable society existed, of which the prisoner was a member, acts done in that society were admissible evidence against the prisoner, though he was absent from the society at the time those acts were done. *Ridgeway's Rep. Weldon's tr. 42, 43.*

In the KING v. JOHN LEARY, on the same indictment; at the same commission:

Mac Nally, for the prisoner, objected, that though all acts done at general meetings of persons implicated in a conspiracy was legal evidence against a prisoner charged as being one of the conspirators; yet the private declaration of an individual not appearing to have been communicated to the body at large, or at all adopted by it, could not be received as evidence against the prisoner: The court acceded. *Ridgeway's Rep. Leary's tr. 105.*

In the same case, papers which had been received in evidence in *Weldon's* case, being offered in evidence against the prisoner *Leary*,

Mac Nally, his counsel objected, that though these papers were admitted as evidence in *Weldon's* case, they were now liable to stronger objections than those made on the former trial. It did not appear that these papers were ever in the possession of the prisoner, or that they were the same papers that he was sworn to in the society; or that they were ever shewn to him, or ever read in his hearing; or that he was ever made acquainted with their contents.—Neither did it appear that any person, having possession of these papers, was in any one instance in company with the prisoner. The evidence was, that the witness had seen the prisoner at a house in *Stonebatter*; there was a paper laid upon a book, and something said, which he does not know, nor does he venture to swear that either of the papers laid

upon the book was the identical paper offered now as evidence. Therefore he submitted that this case was distinguishable from the point determined in *Weldon's* case; and on the trial for treasonable conspiracy in England; for it did not appear that these papers were read or used at the meeting in *Stoneybatter*, or at any other seditious meeting, having in view the perpetration of the offence charged upon the prisoner as a conspirator in treason; if that were the case, the objection would be weakened indeed; but there was no evidence of that, or of any other fact to shew that the prisoner knew their contents: and no paper ought to be read against a prisoner without previous proof that he knew their contents, and assented thereto or admitted them—to admit the reading of such papers would be to receive the weakest presumption as evidence against the prisoner.

Mr. *Prims Serjeant (Fitzgerald)* insisted, that the papers offered ought to be read on two grounds. The principle upon which the court had already determined one or two points of evidence went directly to determine the admissibility of the papers independent of the ground on which they were originally offered. The principle upon which the general acts of a body are admissible against an individual of that body applied to these papers. What had the witness said to introduce these papers? He said that he was sworn upon these papers, that signs of the *defenders* were then communicated to him, and that upon a subsequent meeting between him and the prisoner, there was a communication between them of more signs. The ground upon which these papers were offered was as explanatory of what *Hart*, one of the conspirators, had said, which was acquiesced in by the prisoner, and acted upon that very night. The second ground for receiving them was—that the papers were brought forward in support of the consistency of the witness *Lawler*, to shew that he had pointed out these papers as being in the possession of *Kennedy*, a conspirator, and the same principle which induced the court to admit evidence of the place where the papers were found, calls for the admission of the papers themselves.

CHAMBERLAINE,

CHAMBERLAINE, J. B. R. was of opinion that the evidence should go to the jury in the point of view mentioned by the counsel for the crown, namely, as evidence of the intentions, schemes, and designs of the persons associated under the name of defenders; and if the court stopt the evidence, it would interrupt the train of such discovery. It cannot be denied that there is evidence to go to the jury of the proceedings of defenders. At the first meeting an oath was administered to the witness, and certain private signals communicated to him by which he was to be introduced. The prisoner was acquainted with those signals, and communicated them to the witness; therefore the papers must be material to develop the real designs of those persons. It is of the essence of this charge, (a treasonable conspiracy) that the jury should be convinced of what the schemes of the defenders were, and there is nothing more proper to shew than these papers, because the jury may infer that every man associated must have been privy to their designs, provided they believe that the papers are the same. *Ridgeway's Rep. Leary's tri.* 126.

In the *KING v. WILLIAM STONE*, indicted at bar, Hilary, 1796, for high treason, in compassing the death of the king, several points of evidence in conspiracy were ruled.

LORD GRENVILLE, who was examined as a witness, said, that certain letters then produced came to him in a confidential way which ought not to be discovered; and he had reason to believe they came from abroad.

These letters being proved to be the hand-writing of the rev. *William Jackson*, who had been tried and convicted of high treason in Ireland, and who was charged in the indictment to have conspired with *Stone* in the treasons charged, were offered in evidence.

Adair, Serj. counsel for the prisoner, objected to the reading of those letters. He said there was no principle or rule of evidence upon which they could be offered in support of the present indictment against the prisoner. There was no evidence that they ever came directly or indirectly to the hands or the knowledge of the prisoner; but there was evidence of the direct contrary to be pre-

fumed by the manner in which they were produced. They were letters said to be written by *Jackson*, probably written by him, and transmitted by him abroad, not through the prisoner, and of the contents of which, as such, it was impossible that the prisoner could ever have had any knowledge. Therefore the question being upon a charge that the prisoner had acted with a knowledge of the views of *Jackson*, and that he co-operated in those facts, it was impossible that any thing written, any thing said, any thing done, by *Jackson*, not proved to have come to the knowledge of the prisoner, could be in any degree evidence to implicate him in the guilt of *Jackson*; it was not competent loosely to enter into any question of the contents of these letters; whether they do shew any guilt of *Jackson*, whether they disclose what *Jackson's* views in sending those letters were, because it was admitted.

The *Attorney General*, for the crown, The objection is, that because the papers were not proved to have been seen by the prisoner, that therefore in an indictment, where the overt-act is a *conspiracy*, they are not evidence to go to the jury. Now the indictment charges that the prisoner conspired with *Jackson* and others to send *intelligence*, among other things, with respect to the state of affairs in this country; and therefore these papers are offered as evidence of an act done by *Jackson* in furtherance of the conspiracy. The letters were read in evidence by order of the court. *Stone's trial by Gurney, edit. 147. Ante Leary's case, 626.*

In the same case, the *Attorney General* on proceeding to offer in evidence a letter proved to be in the hand-writing of the rev. *William Jackson*, dated *March 17, 1794*, said, that the ground he offered this letter as evidence was, that it was in the hand-writing of *Jackson*, and that it pointed out the places in which an invasion might be made in the country, and that it was sent abroad by *Jackson*. The question was, whether this letter could be read in evidence against the prisoner? And he conceived it might, on these grounds, that is to say: the overt-acts charged by the indictment were—a *conspiracy* between *Hurford Stone*, *William Stone*, and *Jackson*, to give intelligence to the enemy where they might invade

yade the country, and assisting each other in procuring that intelligence. It was not necessary to state all that had been already proved with respect to the connection between *Jackson* and the prisoner; but he was intitled to state, generally, that it had been proved to be a common object both to communicate (*quo animo* was to be considered afterwards) intelligence to the enemy upon this subject. It was established that the intelligence which was procured by *William Stone* was in point of fact communicated to *Jackson* first, and by *Jackson* afterwards—then the rule of evidence follows, that having once brought together persons conspiring for one common object, whatever they do with reference to the same end, is evidence to be admitted against both, subject always to the decision of the jury, how far that evidence which is admitted against both should be taken to bear, in its inference and effect against the particular person,

In support of his argument, the attorney-general cited the case of the *King*, at the prosecution of the countess of *Strathmore* *v.* *Stokey Bowes*, and others. It was an information in the King's Bench for conspiring to run away with the prosecutrix. The cause was tried before Mr. Justice *Buller*. The prisoner's counsel contended, that acts done by individuals upon that record, in the absence of each other, could not be given in evidence against persons who were not present at the committing of such acts; but the COURT ruled, that when proof is given that the parties charged had a connection with the conspiracy, every act that any one did in that conspiracy was evidence against each.

The same rule was also laid down repeatedly in the late state trials. It was the basis of the whole proceedings on those trials, and there was hardly one tittle of evidence could have been given on those trials unless this was the rule. Now if it has been proved that *Jackson* came from *France* to *England* addressed to *Stone*, and that *Jackson* and *Stone* were in habits of communication together upon the subjects charged in the indictment, and that they continued their correspondence upon these subjects after *Jackson* had left this country and went into *Ireland*, this letter, containing the substance of those communications which had

had before been made by *Stone*, and being communicatory for the same purpose, upon the common principle before laid down, it is the act of a person first proved to be embarked in the same scheme and project, done for the purpose of carrying on that common scheme and project, and as such is admissible evidence in conspiracy.

Admir, serjeant, for the prisoner, answered, that the principle upon which the question was to be decided, was essentially distinguishable from both the cases put by the attorney-general, and from every case he had ever heard of, to which evidence that can in any degree be assimilated to the present case can be received. He admitted, that when several conspirators charged with confederating together for the commission of the same offence, are put upon their trials *together*, that then there cannot be a doubt that every piece of evidence that affects any one of them, is admissible upon that trial, though it might not be evidence against others: and it then becomes the duty of the court, to distinguish the effects of those pieces of evidence, which are legal evidence against one of the parties accused, and which are not legal evidence against the other. But the case is totally different, where evidence is to be given of acts done by a conspirator, *not* upon his trial; and acts done by that conspirator, when he was separated and at a distance from the person with whom he is accused of having confederated with the object charged in the indictment.

The evidence received on the late state trials, is essentially distinguishable from that now offered in this. The charge against all the prisoners upon those trials was for acts done by them, as members of a society, alledged to be confederated together for the purpose, by their collective strength, and by their collective acts of overturning the government and constitution of their country. It was upon *that* ground alone that the attorney-general then contended, that the acts of these societies were evidence against each and every one of the prisoners, who were members of these societies, after general evidence had been given implicating them in one general design; because, from the very nature of these acts, they were *collective* acts, done by the societies of which those persons were members, or of societies proved

to be in direct correspondence for the purpose, with the society of which they were members. And in no one instance in these trials, was the individual act of any member of those societies not done in the communication immediately to the societies themselves, but expressive of the private sentiment and opinion of that individual member, given in evidence against any but the individual person; no declarations *out* of these societies, and not in immediate communication and correspondence with those societies, no declarations of individual members were given in evidence against any others, except the letters of the secretaries of the societies, which were considered as evidence against the members of that society, of which evidence was given that they were implicated in one general design. Where are we to stop, if evidence is to be given to affect Mr. *Stone* with the criminality of a letter of *Jackson*, writing letters in another country to persons, with whom Mr. *Stone* is not proved to have any connection, and no tittle of which is even pretended to be communicated to him. The preceding letter was read, on the ground of its reciting papers which had been brought home to the prisoner, but in this letter there is nothing which has been brought home as evidence against him; there is no reference to any act of his; no proof, in the slightest degree, of his privity to any one sentiment that this letter is supposed to express; and so far from its being evidence of a confederacy together, in furtherance of the same object, it is evidence to the direct contrary; because every part of the information communicated by *Stone* to *Jackson*, was evidence tending to prevent an invasion of this country, whereas this letter of *Jackson's* as stated by the attorney-general, invites and points out the places for an invasion.

Erskine, same side. In the late trials the court in admitting the evidence adverted to, pronounced its judgment in this manner: that is to say, that the counsel for the prisoners seemed to conceive that it was offered as evidence to affect the prisoner; whereas lord chief justice *Eyre* desired that it might be for ever recollected, that the cause divided itself into two branches, that the
counsel

counsel for the crown were first to shew that a conspiracy existed, as an abstract proposition; and then that the prisoner was a member of that specific conspiracy. That though evidence may be given of any thing done, or said, by persons not present and co-operating in what they did or said with the prisoners, that then the evidence was belonging to the first branch of the division, as competent to prove the first, but not the second branch of the charge upon the record; that is, to prove that a conspiracy did exist, but not to shew that A. B. or C. had any specific share in that conspiracy. If this evidence is only to be received in that fashion, and subject to that limitation, there can be no objection to the decision on the late trials; for what is struggled against here is, that what *Jackson* in this letter proposes to communicate cannot be evidence against this gentleman in any other way than to shew whether *Jackson* was guilty; and it is not material to the prisoner whether he was or no.

Mr. attorney-general, (in reply.) No evidence can be received in a trial between the crown and a prisoner, which is not evidence to be put to a jury, whether it does affect that prisoner or not. In the cases referred to, the evidence was received upon the principle stated; upon the principle which has been acted upon in every case of treason, of murder, of conspiracy, that is to be found where the act of any particular person has been given in evidence against any man absent. The evidence referred to, was offered on a full persuasion, that the law of England can never admit evidence to be received, which it will not permit to go to the jury, finally to determine whether it does or does not affect the prisoner: but when persons are brought together for one and the same common end, whatever one does with respect to one and the same common end, is a fact to be received against all of them; and unless upon the discussion of the effect of the acts which individuals do, and the acts which other individuals do, engaged in the conspiracy, you cannot say the individual on trial is guilty, you must acquit him; but still if he acts in furtherance of the same conspiracy, it must go to the jury, to determine whether

whether the accused does authorize and concur in those acts done in furtherance of the conspiracy.

In the late trials the letter of *Martin*, addressed to no person, and the letter of *Thelwell*, in which he spoke of the Americans having too much veneration for property; too much for religion, and too much for law, and which was addressed to a particular person, but which had reference to the society for conspiring were read. It is said, if persons are *trying together* for a conspiracy, such evidence may be read; how can *Jackson* be tried upon this record, who was tried and died a year ago? in lord *Stafford's* trial this sort of evidence was admitted. In the case of murder, where a man holds horses at a gate, and the murder is committed in the field, the acts in the field are to be given in evidence against the man who stands at the gate: why? because it is for the jury to consider, whether the standing at the gate, and holding the horses, is an act done in execution of one common purpose with those who in his absence are murdering the person in the field. In the case of burglary and of riot, it is the same. Vide lord *Stafford's case. Ante 619. Lord Lovat's case. Ante 619.*

LORD KENYON, C. J. That there is sufficient evidence to connect *Jackson*, and *Stone*, the prisoner at the bar, sufficient evidence given to permit that conclusion to be made, there can be no doubt. If acts done by the societies at *Sheffield*, were sufficient to ascribe guilt to parties not present at the time. If letters written by the secretaries to those societies, not communicated to the person to whom the guilt was to be imputed by these letters, otherwise than arising from their acting in concert with their parties, if that was so decided, this point is decided.

Rule the Third.

It is also settled, that the fact of conspiring need not be proved, but may be collected from other circumstances.

As in the *KING v. PARSONS*, and others. The defendants were convicted on an information for a conspi-

racy, to take away the character of one *Kempe*, and accuse him of murder, by pretended conversations and communications with a ghost, that conversed by knocking and scratching in a place called *Cock-lane*.

LORD MANSFIELD, who tried the information, directed the jury, that there was no occasion to prove the actual *fact of conspiring*, but that it might be collected from collateral circumstances; and should be glad to know the opinion of his brethren, whether he was right in such direction. *Quod nemo negavit.* 1 *Blackf. Rep.* 392, 401.

Rule the Fourth.

So if several persons meet at a particular place, from different motives, and being met, all act together to one common end, such acting together makes all the parties conspirators.

As in the KING (at the prosecution of *Charles Macklin*) *v.* LEE, and others, *B. R. England*, 1774.

Macklin was an eminent player, and several attempts were made to drive him from the stage. The court of king's bench granted an information against the defendants for *conspiring* to ruin him in his profession, &c. *Vide* the Inform. *Dough. Cr. Cir. Affist.* 160.

On the trial, the defendants counsel insisted, that the prosecutor, in support of a conspiracy, should give evidence to shew, that there was a *previous* meeting of the parties accused, for the *purpose* of *confederating* to carry their purpose into execution.

LORD MANSFIELD over-ruled the objection. Conspiracy, he said, was derived from the verb *conspiro*, a breathing together; and therefore if a number of persons met together for *different* purposes, and afterwards joined to execute one common purpose, to the injury of the person, property, profession, or character of a third person, that was conspiracy, and it was not necessary to prove any previous consult or plan among the defendants against the party intended to be injured. *MS.*

CHAPTER

CHAPTER XXVIII.

*Of Evidence on an Indictment for Perjury.***Rule the First.**

A JURY ought not to convict a defendant charged with this offence, without clear proof that the false oath alledged against him was taken with some degree of deliberation: and therefore they ought not to convict, if, upon the whole circumstances of the case, it shall appear probable, that it was owing rather to the weakness than perverseness of the party; as where it was occasioned by surprize or inadvertency, or a mistake of the true state of the question. 1 *Hawk. P. C. ca. 69.* 5 *Mod.* 350. *The King v. Melling.* 10 *Mod.* 195. *The Queen v. Muscot.*

Rule the Second.

Two witnesses are required in proof of perjury: otherwise there would be only one oath against another. *Ante* 37. 4 *Blackf. Comm.* 150.

For written evidence admissible on a trial for perjury, *vide Ante* 468, to 474. *Law of Evidence* 289. 3 *Mod.* 116, 117. *Lord Raym.* 451, 893, 936, 1221. *Cases Temp. Will.* 3. 511. *Cases Temp. Maccles.* 74, 108, 109, 194, 195. 3 *Peere Will.* 196. 1 *Strange* 545.

In the *KING v. JAMES*. Information for perjury, in an affidavit in the common bench, made before the commissioners in the country, in a certain cause depending there, was tried before *EYRE*, and the defendant convicted. Several exceptions arising upon the evidence, the judge stopped the *posse* until the opinion of the court was had. The *proof* of the cause depending was only a *capias*, the warrant thereon, and an affidavit filed. Another exception was urged, that there was no proof that the party before whom the defendant was sworn,

was a commissioner; and the court held there need not, unless disproved on the other side.

It was then suggested, that the evidence was *only* by copy of an affidavit, and no evidence that it was the defendant's; that this was a dangerous practice; any man might be thus represented and subjected, by the fraudulent substitution of his name, to the penalty and infamy of perjury.

The COURT admitted the force of the objection, if an affidavit were to be thus proved singly. But where it was regularly introduced by evidence of a cause commenced, which is very different from imputing an affidavit to another, without establishing a ground why there should exist one, or shewing a reason for its being made, or that it was used by the party in the cause. *Judgment pro rege. Show. 397. Law of Evid. 291. S. C.*

CHAPTER XXIX.

Of the necessary evidence to support an Indictment of SUBORNATION of PERJURY; which is the proving a person to take a false Oath, amounting to Perjury.

Rule

TO bring the offender within the legal meaning of this offence, it is necessary to alledge in the indictment, and to give in evidence, upon the trial, that the party so suborned, did actually take such false oath. *The King v. Henton, and Brown. 3 Mod. 123. Keb. 399.*

NOTE. A person attainted of subornation of perjury, falls within the rule of *infamy*, incapacitating from giving evidence. *Repellitur a sacramento dicendo qui jure sit infamis. Vide Ante 206, to 213.*

CHAPTER

CHAPTER XXX.

Of Evidence to support an Indictment for Forgery.

FORGERY, by common law, is the *falsely* and fraudulently *making* or altering any matter of record, or any other authentic matter of a public nature, as a parish register, or any deed or will; in order to give such instrument or writing an appearance of truth, and thereby impose that upon the public, as the solemn act of another, which he is no way privy to; or to make a man's own act appear to have been done at a time when it was not done, and by force of such falsity, to give it an operation, which in truth and justice it ought not to have. 1 *Hawk. P. C. ca. 70.* 11 *Co. 27.* *Foff. 117.*

Rule.

From the above definition results a perspicuous and general rule, that in all charges of forgery, whether the indictment be at common law or by statute, there must appear in evidence circumstances to satisfy the jury, beyond a reasonable doubt, that the defendant had a design to cheat or defraud some person or persons named in the indictment; and the same rule is also applicable to the offence of publishing, uttering, &c. as the case may be. Vide **COMPETENCY** and **VARIANCE**, in *Index*.

CHAPTER

CHAPTER XXXI.

Of Evidence to support an Indictment against Cheats at Common Law, and on the Statutes, 33 Hen. 8. ca. 1. 30 Geo. 2. ca. 24. Irijb. 26 Geo. 3. ca. 37. 13 Stat. at large, 842.

CHEATS punishable at common law are, in general, those who by deceitful practices *defraud*, or *endeavour* to defraud another of his right, by means of some *artful device*, contrary to the plain rules of common honesty; but there must be an *artful contrivance*, and not a bare *naked lie*. 1 *Hawk. P. C. ca. 71.*

Rule the First.

As an indictment for a fraud, by obtaining money under *false pretences*, against the *stat. of Geo. 2.* must state what the false pretences were by which the fraud was effected; so the false pretences stated, must be proved in evidence. *The King v. Mason. Leach's Cr. Ca. 3 edit. 548. 2 Term. Rep. 586. Post 640.*

Rule the Second.

In order to constitute the offence, the property must be obtained either by *conspiracy*, or by means of a *false token* as well as a *false pretence*, and not by a mere false assertion, a false message, or mere *naked lie*. 1 *Hawk. P. C. ca. 71.*

So ruled in the *KING v. BENJAMIN LARA, Old-Bailey, Decemb. sess. 1794.* The evidence was, that the prisoner, on the day laid, purchased from the prosecutor, *Benjamin Mendez da Costa*, a large quantity of lottery tickets, bargained with him to the amount of 2157*l.* 10*s.* and obtained the delivery of them from him, by giving him a draft for the amount on Messrs. *Ladbroke*, and Co. bankers, in whose hands he was so far from having cash, that he had not even opened an account with them.

Shepherd, in *Trinity 1796*, obtained a rule to shew cause why the judgment should not be arrested, because *first*, the indictment being for a fraud at common law, it ought

ought to have charged, that the defendant had used some extrinsic token against which common prudence would not have been sufficient to guard, and not his *bare assertion* only, for the purpose of effectuating the fraud. *Secondly*, this transaction was merely of a *private nature*, upon a subject that only concerned the parties themselves, and not a matter of *public concern*, as it must be for the purpose of supporting an indictment.

Erskine, Garrow, Wood, and Knowlys, on shewing cause, argued, that the indictment had been framed for a fraud at common law, because the *statutes* 33 *Hen. 8.* and 30 *Geo. 2.* only applied to such persons as should by *false tokens*, or false pretences, obtain *money or goods*, and that by analogy to other cases, it was apprehended *lottery tickets* might not be within either of these descriptions. They admitted, that according to the *King v. Wheatley*, 2 *Burr.* 1125, that a fraud upon an individual must, to be indictable, be effected either by *conspiracy* or by a *false token*, as well as a *false pretence*, of such a nature as common prudence could not guard against; and they contended, that the *false pretence* in the present case was, that he wanted to purchase lottery tickets, and the *false token* the draft upon the bankers, which he gave for the purpose, and as the means of getting possession of them. This draft imported on the face of it, that *Lara* had a right to draw on *Ladbroke* and company, and therefore it amounted to more than a bare promise to pay; for he could not have obtained possession of the tickets on such promise alone. *The King v. Locket, Leach*, *Cr. Ca.* 3 *edit.* 110. *Fost.* 120. *Latch.* 201. 2 *Ld. Raym.* 1179. *Sayer* 206. 2 *Strange* 1127. 1 *Blackf. Rep.* 273.

LORD KENTON, C. J. The true boundary between the frauds which are, and those which are not indictable at common law, is clearly settled in the *King v. Wheatley*. It is there said, that there must be either a *false token*, or a *conspiracy*; for a *false affirmation* alone is not sufficient; as in the case there mentioned, where a person falsely affirmed, on selling a sack of corn, that it contained a *Winchester bushel*. In the present case, the defendant used no false token, but obtained the credit solely on his own

own *false assertion*. He sat down indeed and drew a draft upon a banker, but the drawing of this draft left his credit exactly as it was before, and therefore it cannot be called a *false token*. His conduct was grossly immoral; but as he used no false token to accomplish the deceit, the judgment must be arrested.

GROSE, J. HAWKINS speaking of cheats says, "It is an indictable offence to defraud another of his known right, by means of some *artful device*; but that the deceitful receiving of money from one man to another's use, upon a *false pretence* of having a message or order to that purpose, is not punishable by a criminal prosecution, because it is accompanied by no manner of *artful contrivance*, but wholly depends on a bare naked lie." To make the assertion of the defendant in the present case something more than a bare naked lie, it said that the draft on the banker was a *false token*; but that was only adding one falsehood to another, and if this were to be determined an indictable offence, I do not know how to draw the line, for it might be equally said, that every person who over-drew his banker, used a *false token*, and might be indicted for it. 1 *Hawk. P. C. ca. 71. sec. 2. Ante*.

LAWRENCE, J. concurred, and mentioned *Nebuff's* case, where a person borrowed six hundred pounds of a married woman, and promised to send her fine cloth and gold dust as a pledge; and sent no gold dust but some coarse cloth worth little. The court held it was not a matter criminal, but it was the woman's fault to repose such a confidence in another person. 1 *Salk. 151. Leach Cr. Ca. 3 edit. 739 to 753.*

Rule the Third.

It hath been determined, that the statutes of *Henry 8.* and *Geo. 2.* are made in *pari materia*, and that the latter only enlarges the description of the offence given in the former, and that whatever has been determined in the construction of one of them, is a sound rule of construction as to the other. *The King v. Mason, 2 Term. Rep. 586. Leach Cr. Ca. 3 edit. 548. Ante*.

And

And it has been determined in the *King v. Munoz*, that to bring an offender within the statute of *Hen. 8.* there must be evidence of a *false token* used: and therefore where the evidence was, that one man went to the house of another, and pretended that another person had sent him to receive twenty pounds and received it, whereas such person did not send him, it was held no offence within the statute. 2 *Stra.* 1127.

Rule the Fourth.

The statute of *Geo. 2.* extends to every case where a party has obtained money by falsely representing himself to be in a situation in which he was not; or any occurrence that had not happened, to which persons of ordinary caution might give credit.

Therefore in the *KING v. YOUNG*, and others, *on writ of error in Banc. Reg.* The error assigned was, that the offence, as described in all the counts of the indictment, was not an offence against either the stat. of *Hen. 8.* or *Geo. 3.* The evidence was, that *Young*, and the other defendants, pretended to one *Thomas*, that he, *Young*, had made a bet of five hundred guineas, with a colonel in the army then at Bath, that one *Lewis* would, on the next day, run on the high road, ten miles in an hour; and under colour and pretence of having made the bet, they obtained from *Thomas* twenty guineas as a part of the bet, though no such bet was made. The court held this offence, which was described in the indictment, as proved to be a *false pretence* within the statute of *Geo. 3.* for this statute hath introduced another offence, than that in the stat. of *Hen. 8.* describing it in very general terms. *Leach's Cr. Ca.* 3 edit. 568.

NOTE. In the *KING v. ANNESLEY SHEE*, *Middlesex sess. 1800.* On evidence that a promissory note was obtained under a false pretence, and afterwards, and before the day in the indictment, was converted into cash by the defendant, it was held to be the same as if money had been originally received, by the deception used. *M.*

CHAPTER XXXII.

Of Evidence to support an Indictment for a Libel.

Rule the First.

TO consummate the offence of libelling, evidence of publication is essential.

It was resolved in *Trinity, 9. of Will. and Mary*, that possession is evidence of the defendant's being author or publisher: for though he never published, yet having the libel in readiness for that purpose, is criminal, and though he might design to keep it private, yet after his death it might be injurious to government. *Carth. 409, 410.*

In the *KING v. BEARE, Hil. 10 Will. 3. B. R.* it was resolved. *First*, that copying a libel is not in itself a publication, but evidence of publication. *Secondly*, if a libel be publicly known to be published, possession of a copy is evidence of publication: but *contra* where it is not known to be published. *Thirdly*, where a libel is produced, and the author is not known, that amounts to *prima facie* evidence, that the writer is the author, and throws the proof upon him; and if he cannot produce the composer, the verdict must be against him. *Fourthly*, taking the copy of a libel, is evidence of a libel, because it comprehends all that is necessary to make a libel. And *HOLT, C. J.* said, that the making is a genus, and composing, contriving, and writing, are species; and *TURTON and ROKEBY, J's.* cited cases to shew that writing a libel, without publishing, was punishable in the star-chamber; and by consequence is now punishable by indictment. *1. Vent. 31. 1 Ld. Raym. 417.*

And *HOBBS, C. J.* added, where a libel appears under a man's hand-writing, and no other author is known, he is taken in the *mainor*, and it turns the proof upon him. *Ibid. 2 Salk. 419. 12 Mod. 220, 221. 4 Read. Stat. 155.*

But

But

But in *ENTIC v. CARRINGTON*, and others, *Mich. 6 Geo. 3.* it was said, papers are the owner's goods and chattles, and until *publication*, a writing is as the thoughts of the composer, not manifested by any outward act; and therefore previous to publication, the papers of a man are in every sense his property, the secure enjoyment of which it is one of the primary ends of society to protect. *11 St. Tr. 321.*

In *BARROW v. LLEWELLEN*, the rule was thus laid down. A libel is clearly published, if but a single copy reaches a single hand to whom it conveyed with intent of publishing to that person, by making the contents known. But if stolen from the author, or seized by violence, whether under colour of law, or without such pretence, this is not a publishing, so as to affect the author. *Hob. 62.*

In *BALDWIN v. ELPHINSTON*, *error in Excheq. Chamb. from B. R. Trinity, 15 Geo. 3.* it is held, that though printing is *prima facie* evidence of publishing, it is not conclusive evidence. *2 Blackf. Rep. 1038.*

But printing in a newspaper admits of no doubt upon the face of it: and it shall be intended a publication, unless the defendant shews by evidence, that the newspaper so printed by him, was suppressed and never published. *Ibid.*

In the same case, various modes of publication are stated, *viz.* a written libel may be published in a letter to a third person; or by fixing the libel on a public place. *Rast. Entr. tit. Act. sur le cas. 3. a. Lord Raym. 341. 417. 486.* But reading a libel in the presence of another, or repeating part of it in merriment, is not evidence of publication. *9 Co. 59. Moer 813. Salk. 418. Hawk. P. C. ca. 73. sec. 11.* But to read a libel, or to hear it read by another, and afterwards maliciously to read, or repeat any part of it, in the presence of others; or lend or shew it to another, are facts, which when proved, establishes a publication. *3 Bac. Ab. 497. 12 Vent. Abr. pl. 1. 229. 2 Blackf. Rep. 1038.*

Rule the Second.

The consent of the master to the act of the servant in printing a libel, is *prima facie* evidence of publication by the master, and a general allegation of ignorance is not admissible evidence in his favour, though he may repel the presumption by proof of particular facts.

As in the *KING v. BENJAMIN HARRIS*, 32 Car. 2. for publishing a libel. In this case the proof of publication was, that books were sold in the defendant's shop, not by him, but by his man, and there was also proof of quires of the same book being in his shop. It was however admitted, that the defendant did sell one book, but that soon as he heard there was any thing ill in it, he suppressed the sale.

SCROGGS, C. J. held, the act of selling under the circumstances stated, evidence of publication; and stated that all the judges had declared the offence of selling to be punishable in the seller, though in the way of his trade. 2 St. Tr. 1039. Vide *lord Camden's observations on this trial*. 11 St. Tr. 322. *Entic v. Carrington*.

So in the *KING v. NUTT*, Hilary, 2 Geo. 2. the defendant was indicted for publishing a treasonable libel. It appeared in evidence, that she kept the shop where the libel was sold, but no evidence was offered to prove her knowing of its being bought in, or sold out; and she proved, that her residence was a mile from her shop, and that she had been bedridden there for a long time, so that the presumption was, that she knew nothing of the libel, or the publication.

Kettleby submitted, that on this evidence she should be acquitted; for though the act of the servant may charge a mistress in a civil suit, it should not charge her in a criminal prosecution.

The CHIEF JUSTICE said, it has been expressly determined, that the master of a shop is answerable for whatever books are sold there. A juror however was withdrawn. *Barnard. K. B.* 386. *Fitzg.* 47.

In the *KING v. ALMON*, Trinity, 1 Geo. 3. B. R. the rule is fully established. This was an application for a new

new trial; upon the ground of the evidence being insufficient to prove any *criminal intention* in the defendant, or even the least *knowledge* of the libel having been sold at his shop. The defendant's affidavit stated, that it was a practice in the trade to put another publisher's name to a pamphlet, as printed for that other, when in fact, it was published for himself. This was the fact in the present case, *Miller* being the real publisher of this libel, though advertised, &c. in defendant's name, without consent or consultation; that the sale in his shop was without his privity, and that he stopped it as soon as he discovered it. The person who sold was defendant's servant.

Glynn, serjeant, argued, that the proof against the defendant appeared defective; there was nothing to constitute criminality, or to induce punishment.

Lord MANSFIELD delivered the unanimous opinion of the court to be, that the buying the pamphlet, in the public shop of a known professed bookseller, and publisher of pamphlets, of a person acting in the shop, *prima facie*, is evidence of a publication by the master himself, but that it is liable to be contradicted where the fact will bear it by *contrary evidence*, tending to exculpate the master, and to shew that he was not privy, nor assenting to it, nor encouraging it.

That this being *prima facie* evidence of a publication, by the *master* himself, it stands good until answered by him: and if it is not answered at all, it thereby becomes *conclusive*, so far as to be sufficient to convict him.

That proof of a public exposing to sale and selling in his shop by his servant, is *prima facie* sufficient: and must stand until contradicted or explained, or exculpated by some other evidence, and if not contradicted, explained, or exculpated, is, in point of evidence, sufficient or tantamount to conclusion.

Reading the libel charged, shews that it is already *proved* upon the defendant; for it could not have been read against him, before it had been proved upon him.

ASTON,

ASTON, WILLES, and ASHURST, Js. concurred: and the cases of *Harris*, ante 644. *Strahan*, Hil. 2 Geo. 2, post 644. And *Elizabeth Nutt's case*, ante rule 3, were cited,

Rule the Third,

The delivery of a libel by the printer, is evidence of publication by the printer, and the receiver is an actor, in that publication, if he does not forthwith carry it to a magistrate. *The King v. Strahan*, Hilary, 3 Geo. 1.

Rule the Fourth.

And evidence of a libellous paper being found in a man's custody, as upon a shelf in his house or shop, shall make him the printer of it, of consequence it is *prima facie* evidence of his being the publisher, and he must give a good account how he came by it to excuse himself. *Ibid.* 12 *Viner Abr.* 229. 4 *Reqd. stat. law.* 155. *Dig. law. lib.* 22.

Rule the Fifth.

But the bare printing a petition to a committee of parliament, which would be evidence of printing a libel against the defendant, if made for any other purpose but a complaint to a court of justice, and delivery of the copies thereof to the members of the committee, shall not be considered as the publication of a libel, in as much as it is justified by the order of the course of proceedings in parliament, whereof the king's courts will take judicial notice, 3 *Bac. Abr.* 498.

Rule the Sixth,

Where the defendant acts merely as servant, working the press without knowledge of the contents of the libel, he is chargeable as printer.

As in the *KING v. CLARKE*, Hilary, 2 Geo. 2. before *RAYMOND*, C. J. The indictment was, "for printing
" and

“and publishing an infamous libel called *Mists Journal* ;” but the evidence produced was, that he acted merely as a servant to the printer, and his business was only to clap down the press; and few or no circumstances were offered of his knowing the import of the paper, or of being conscious of doing any thing illegal. The defendant, under the direction of the court was found guilty.

So in the *KING v. KRELL*, *Hilary*, 2 *Geo.* 2. The evidence was that the defendant and another composed together the types for printing the work, each taking different columns.

Hawkins and *Kettleby*, for the defendant, objected, that whatever interpretation the whole of the papers might receive taken together, yet taken separately according to the shares which these two persons had in it, the part which the defendant composed could by no means receive such a construction. He was charged *quod libellum impressit et publicavit, et imprimi et publicari causavit*, whereas by the evidence it appeared that the composing was only necessary to the *pressing off*, and consequently as the defendant was only proved to have *composed*, he could not be found guilty of the *pressing off*, (or *printing*) and therefore the information had not charged the defendant with the proper fact. They further observed, that no evidence was given of a publication; therefore there ought to be an acquittal: besides the information charged two offences in distinct and separate parts; one of printing this particular libel, *in hac verba*, the other of printing & libel generally; therefore as to the last charge, as no evidence was given of two offences, the jury ought at least to acquit the defendant of one.

The Attorney General (Sir Philip *Yorke*, afterwards lord *HARDWICKE*.) This libel (which was a pretended piece of Persian history) is one thing *intire*. One part has a dependence on the other, therefore he that is guilty of the one is guilty of the whole. To the second objection he would agree, that is, if this was a civil action brought against the defendant for printing without authority to the damage of a particular person, the evidence given here would not make the defendant answerable; for he would have appeared to have acted merely as a servant,
and

and therefore as he had assisted in one branch only of printing, and not of the whole, he could not be subject to such action. But the present case was of a criminal nature. Where an accessory is criminal in part, he is criminal in the whole; and therefore as the defendant assisted in the composing, which was a circumstance essentially necessary to there being any printing, he by that act made himself answerable for the whole. Composing, he considered, taking a copy of a libel in types and figures; and taking a copy would make the defendant a publisher; and this gave an answer to the third objection. As to the last objection, he observed, that laying informations in this way was begun in the time of *Holt*, and was done out of caution for fear of not succeeding in laying the fact particularly.

RAYMOND, C. J. agreed with the attorney-general in all but the act of publication; and directed the jury that if they believed the evidence they ought to find the defendant guilty of *printing*, which they did. *Barnard, B. R. 305.*

Rule the Seventh.

Though a publication in *fact* be proved, yet exculpatory evidence of facts exculpating the defendant may be admitted. Vide *The King v. Almon, Ante 644.*

Therefore it has been held that the defendant stands exculpated on evidence that he refused to receive the manuscript libel to print, or the printed libel to sell; and that it was clandestinely sold in his shop against his positive orders.

That by reason of sickness, as in the delirium of a fever, he was disqualified from inspecting the press, or regulating the trade of his shop.

Absence, under circumstances not importing fraud or neglect, in which case a temporary manager for the printer or bookseller's business stands during the interval in the same responsibility as the master would have stood.

Imprisonment is *prima facie* exculpatory evidence; but not conclusive; for if access of servants to the prison be proved

proved and liberty of transmitting copies, proof-sheets, &c. be shewn, the exculpation ceases. *The King v. Woodfall*. 1 *Hawk. P. C. ca. 73. 7 edit. 2 vol. 131.*

And in the *KING v. WILLIAMS*, *Mich. 14 Geo. 3.* where evidence was given that a newspaper containing a libel was published before the defendant rose in the morning, and that the printer afterwards stopped the sale of the paper, the court refused to receive exculpatory evidence, and considered it insufficient evidence for acquittal, but intimated that after verdict it would be proper in mitigation of the sentence.

In the *KING v. SALMON*. *Hil. 1717. B. R.* The defendant, a linen-draper, allowed his son a printer, to use part of his shop for the sale of pamphlets. In the absence of the son, a pamphlet was called for, and the father ordered his niece to look it out and give it. The publication being libellous, the court granted an information against the son, but not against the father; considering his ignorance of the nature of the pamphlet sufficient exculpation. 1 *Hawk. P. C. ca. 7. sect. 19. 7 edit. 2 vol. 131.*

Rule the Eighth.

The truth of a public libel is not admissible evidence. Neither is the bad reputation of the person libelled. *Hawk. P. C. ca. 73. sect. 6. 5 Co, 125. 1 Stra. 498. 9 St. Tr. 253. The King v. Franklin. 3 Bac. Abr. 495.*

Rule the Ninth.

But in the case of *scandalum magnatum*, when the word false is inserted, the defendant ought not to be found guilty, if the assertion be true. *Emlyn. Pref. St. Tr. 8.*

So in the *QUEEN v. FULLER*, *Guildhall, London, May, 1702.* *HOLT, C. J.* would have permitted the defendant to prove the truth of his allegations, "against noblemen, peers, officers, and ministers of state," had he been able. 5 *St. Tr. 441.*

The above case has been erroneously considered as an authority that the falsehood of a public libel, as to fact, is essential to constitute the criminality, and the truth of it may be proved in justification; but the information

against *Fuller* seems to have been for *scandalum magnatum* on the statute for spreading *false* news to the slander of great men; and in that instance as *falsehood* is a necessary averment in the information or indictments, so it must be proved in evidence. *Hob.* 253. *Moor* 627.

Rule the Tenth.

On indictments or informations for seditious libels, the word *false* in the only sense in which it seems necessarily applicable is included in the word *malicious*; and it appears from various precedents that the word *false* is often omitted in such indictments and informations, which shews it is not an indispensable averment nor necessary to be proved.

Rule the Eleventh.

Publication on which a defendant may be convicted must always include *malice* either *express* or *implied*: where therefore the facts in evidence exclude such implication, a defendant is not legally liable to be convicted. *Gillb. Law. Evid. by Loft.* 845, 846.

The case of an individual illustrates this rule. In the *KING v. HART. Mich. 3 Geo. 3. Mary Jones*, a quaker, was expelled, as appeared on the quakers books, "for not practising the duty of self-denial." Having got a copy of the resolution, she applied for an information against those who signed it for a libel; and this being refused, she indicted them, and they were found guilty. The court granted a new trial, the whole transaction being merely *matter of discipline*. 1 *Blackf. Rep.* 386. See *the King v. Paine.* 5 *Mod.* 167. *Ante*

Rule the Twelfth.

Variance in evidence between the original libel and that on the record is fatal. Vide *Variance in Index*.

In the *KING v. HALL. Hilary, 7 Geo. 1.* Information for a libel against the doctrine of the TRINITY. The witness for the crown who produced the libel swore that it was shewn to the defendant, who owned himself the author

author of the book shewn, errors of the press, and some small variations excepted. Defendant's counsel submitted that this evidence would not entitle the attorney general to read the book, because the confession was not absolute, and therefore amounted to a denial that he was author of that identical book: but PRATT, C. J. allowed it to be read, saying, he would put it upon the defendant to shew that there were material variances. 1 *Strange*, 416.

Rule the Thirteenth.

Depositions taken before a justice of the peace relating to the fact of printing or publishing a libel, the deponent being since dead, cannot be received in evidence, though in felony they are admissible by *stat. 1 and 2 Phil. & Mary. Paine's case*, 5 *Mod.* 165. *Salk.* 281. *Comb.* 358, 359. *Ante* 283, 312.

Rule the Fourteenth.

In trial of indictment or information for a libel, on the plea of not guilty, the jury may give a general verdict, and shall not be directed to find guilty (as formerly) merely on evidence of publication and of the sense ascribed. But the judges may give opinion and direction to the jury on the matters in issue, as in other criminal cases, and the jury may find specially if they chuse, and the defendant may move in arrest of judgment as before. *Stat.* 32 *Geo. 3. ca.* 60. *Irish*, 33 *Geo. 3. ca.* 43. 17 *Stat.* at large.

Rule the Fifteenth.

A libel must be proved to be written in the county laid in the indictment; all matters of crime being local, 4 *Read. Stat. Law* 155. 8 *Mod.* 328.

CHAPTER XXXIII.

*Of Evidence to support a Charge of Bribery.**Rule the First.*

THE crime is complete by the *attempt*; and *evidence* of a bribe *tendered*, though *rejected*, is therefore sufficient to convict the defendant.

As in the *KING v. VAUGHAN*. *Mich. 10 Geo. 3. B. R.* Motion on an information against the defendant for offering to bribe the Duke of *Grafton*, then first lord of the treasury, to grant the reversion of a patent place in the island of *Jamaica*, for five thousand pounds.

LORD MANSFIELD. The question turns upon the common law: and the first consideration is, whether a great officer at the head of the treasury, and in the king's confidence, selling his interest with the king, in procuring an office, be not guilty of a crime. The king is not to raise a revenue out of this office. The duke swears, and it is not denied, that five thousand pounds were offered to him to procure this office for Mr. *Vaughan*.

Can it be doubted whether doing this would have been criminal in the duke of *Grafton*. Most of the impeachments against ministers have been for taking money to procure offices grantable by the crown.

Wherever it is a crime to *take*, it is a crime to *give*; they are reciprocal. And many cases, especially in bribery at elections to parliament, the *attempt* is a crime. It is complete on his side who *offers* it.

If a party *attempts* to bribe a judge, meaning to corrupt him in a case depending before him, and the judge taketh it not, yet this is an offence punishable by law in the party that offers it. 3 *Inst.* 47.

So also is a *promise* of money to a corporator to vote for a mayor of a corporation, or to bribe a privy counsellor. *The King v. Plympton*, 2 *Lord Raym.* 1377.

Rule

Rule the Second.

Neither is it material if the party bribed vote contrary to the bribe; for this cannot be given in evidence to exculpate either.

Rule the Third.

A loan on such an occasion is bribery by gift.

As in *SULSTON v. NORTON*. *Mich. 2 Geo. 3. B. R.* Action on the statute of bribery at the election of *Tamworth*. Five counts in the declaration. Jury found a general verdict for the plaintiff. He took it on the first count only, viz. for corrupting one *Moor*, by giving him five pounds ten shillings to vote for lord *Villers* and Sir *Robert Burdett*.

Caldecot moved for a new trial on a suggestion, *First*, That the person bribed did not vote for the candidate in whose behalf the bribe was given, therefore was not corrupted. *Secondly*, That *Moor* gave a note for the money, which it was agreed should be destroyed, in case he voted as desired, and a counter note was given for that purpose: therefore it was a loan, and not a gift; and the verdict should have been taken on the second count for a corrupt loan, and not on the first for a corrupt gift.

LORD MANSFIELD, C. J. FOSTER and WILMOT, J's. The first objection has been already solemnly determined in *BUSH v. RAWLINS*, *Trinity, 29 Geo. 2. B. R.* Action for corrupting one *Harvey*, by giving him twenty-one pounds, to forbear giving his vote for Mr. *Morton*, at the *Abingdon* election preceding. It appeared at the trial, that *Harvey* did vote for Mr. *Morton*, notwithstanding the bribe, and always intended to do so. Verdict for plaintiff, and motion for new trial. It was twice argued; and DENISON, J. delivered the opinion of the court, that this was within the statute, and cited *PHILIPS v. FOWLER*, *Pas. 7 Geo. 2. C. B.* And undoubtedly the offence of the corruptor is complete, notwithstanding the voter afterwards repents.

repents. As if one bribes a juror, and he afterwards gives a right verdict that will not exculpate the offender.

As to the second objection, the loan and note is all colour and device: it is clearly a gift, and the verdict is rightly taken. 1 *Blackf. Rep.* 317, 318.

And in *COMBE, qui tam, v. PITT, Mich. 5 Geo. 3. B. R.* This was an action on the statute after a conviction of the defendant, by information; and three objections were taken to the evidence.

First, That the declaration states that the party was bribed to vote for Mr. *Lockyer* and lord *Egmont*, and it came out in evidence that it was for Mr. *Lockyer* and his friend.

Secondly, That the declaration states that lord *Egmont* and Mr. *Combe* were candidates at the time the bribe was given, and no evidence was given thereof.

Thirdly, That it also states that the persons bribed had a right to vote, but no evidence was given thereof, but that they actually voted.

LORD MANSFIELD. As to the *first* objection in penal actions, the rule is that the material fact must be charged, and a fact charged must be proved sufficient to warrant all the consequences of a verdict. The *material fact* here is being *bribed* to vote. It makes no difference whether the proof was that he was bribed to vote for both, or for *Lockyer* only.

The *second* objection goes upon the vague idea of what constitutes a candidate previous to the day of election. The poll is then the only evidence. The House of Commons, in the case of *Gore*, of *Fing*, candidate for *Bucks*, determined that nothing was evidence of being a candidate but the poll-books. Before the time of election, every one is a candidate for whom a poll is asked. This very fact makes the person on whose behalf a bribe was given, a candidate.

As to the *third* objection.—The defendant shall not dispute a man's right of voting, when he has asked him for his vote. It is a sufficient proof of right that he actually did vote. There is no ground for the objections. Rule discharged. 1 *Blackf. Rep.* 523, 4, & 5. 3 *Burr.* 1423. to 1434, also 1586 to 1591. S. C.

Rule

Rule the Fourth,

The person taking the bribe is a competent witness to prove the bribery. So in *SUTTON v. BISHOP*, and *SELBY v. CUMMING*, it is determined that under *stat. 2 Geo. 2. ca. 24. Engl.* against bribery at elections for members to serve in parliament, the person taking the bribe is a competent witness to prove the bribery, *4 Burr. 2285, 2469.*

CHAPTER XXXIV,

Of Points of Evidence arising upon Indictments of the several species of crimes which come under the head MALICIOUS MISCHIEF, which is defined to be an injury done to the property of another not falling under some more specific denomination, either from the wantonness of a bad disposition, or from particular and deliberate revenge. 4 Blackf. Comm. 244,

Rule,

BY *stat. 9 Geo. 1. ca. 22.* "the cutting down and destroying trees planted in an avenue, or growing in a garden, orchard, or plantation for ornament, shelter, or profit," is made felony, *without clergy.*

DOCTOR BURN in his *Justice of Peace* has observed that the being armed and disguised in the manner specified in the act does not seem to enter into the constitution of the offence described by the statute as to this and some other criminal acts, but to offences precedently specified by the act.

Consequently it follows that the indictment need not aver, nor is any evidence required to prove that the persons destroying trees so circumstanced as described were armed or disguised.

But

But in the *KING v. BAYLIS and REYNOLDS*, 9 Geo. 2. it was ruled that the defendants being in the high road armed and disguised, is made a substantive felony by the act; though the fact of being so armed and disguised need not be given in evidence on indictments for several other offences under the act which are independent of it. *Cas. Temp. Lord Hardwicke*, 291.

CHAPTER XXXV.

Of Evidence in particular cases respecting Coining not made Treason.

Rule.

PERSONS uttering false money, gold or silver, knowing it to be false, are subjected on the *third* offence to felony without benefit of clergy. *Stat. 15 Geo. 2. ca. 28. sec. 9. Irish, 23 & 24 ca. 50. sec. 2. 12 Stat. at large 779.*

With regard to *evidence*, by which a repetition of this offence is to be proved, it is provided by the same statute, that if any person uttering or tendering any false or counterfeit money as aforesaid, shall afterwards be guilty of the like offence in any county or city, the clerk of assize, or the clerk of the peace for the county or city where such conviction was so had, shall at the request of the prosecutor, or any other on his majesty's behalf certify the same by a transcript in a few words containing the effect and tenor of such conviction, and such conviction being produced in court, shall be *sufficient proof* of such former conviction.

By a subsequent statute, persons counterfeiting copper money, halfpence or farthings or buying, selling, taking, paying, or putting off such money under the value by which its denomination imports, are made felons. *11 Geo. 3. 40. Irish. Vide last cited stat. sec. 6.*

Consequently on the second offence, if the record of the former conviction be given in *evidence*, no lay person can have the benefit of clergy.

As in the case of WILLIAM MARSTON, ROTHWELL, *Old-Bailey sess.* 1783. The defendant was tried a second time and convicted, and the record of his former conviction being produced, it was held that he could not plead the benefit of clergy in bar of execution, he not being in holy orders, and having pleaded it on the former conviction. *Addingt. Penal Stat.* 122.

The KING v. JAMES SCOTT, and others, is fully reported. *Old-Bailey sess.* October, 1785.

Scott and three others were tried before NARES, J. on an indictment containing four counts founded on 11 Geo. 2. c. 30. *First*, that Isaac Votear and Thomas Dean "one piece of copper money of this realm called an halfpenny, then and there unlawfully and feloniously did make, coin, and counterfeit against the statute." *Second*, That "George Franklin, of &c. and James Lest, of &c. did unlawfully and feloniously counsel, aid, abet, and procure Isaac Votear and Thomas Dean, &c. to do and commit the said felony, &c." *Third*, That "Isaac Votear and Thomas Dean, &c. at the parish aforesaid, &c. one piece of false, feigned, and counterfeit copper money to the likeness and similitude of the good, legal, and current copper money called a halfpenny, then and there unlawfully and feloniously did make and coin, &c." *Fourth*, This count charged Franklin and Scott as aiders and abettors to Votear and Dean.

The prisoners were all convicted; and on being brought up for judgment, they prayed the benefit of clergy, which was allowed, and each of them were sentenced to pay a fine of one shilling, and to suffer one year's imprisonment in Newgate.

On the 13th of October, 1785, James Scott, one of the above four prisoners was convicted with two other persons at the *Old-Bailey*, on the same statute, for having counterfeited a farthing, and again prayed the benefit of the statute.

The counsel for the crown filed a counter plea, setting forth the former indictment and conviction, averring that the prisoner was the same person who was named in the first indictment, and that since he had already re-

ceived the benefit of the statute, and had been admitted to his clergy, prayed judgment of the court, "and that the said *James Scott* may receive judgment to die according to law."

The prisoner replied, *Nul tiel record*, and denied that he was the person named in the said plea; and the crown joined issue on this replication.

The sheriff returned a jury *instantly*.

The evidence produced to substantiate the counter-plea was the record of the first conviction, which stated the several adjournments of the session of the peace at which the indictment was found; the justices before whom it was found; the indictment itself *verbatim*; the process on the said indictment: with the trial and conviction of the several persons mentioned therein; that they severally prayed the benefit of the statute, which was allowed them, and judgment given against them respectively to be fined one shilling and imprisoned one year in Newgate.

The counsel for the prisoner contended,

First, That the counter-plea was insufficient, inasmuch as the indictment therein stated differed materially from the record of the indictment produced in evidence; and that the *tenor* of the indictment ought to have been correctly stated, the prisoner being intitled to take advantage of all *variances* between the plea and the record.

Secondly, That even if it were not necessary to set forth the whole of the indictment according to its *tenor*, yet that enough should be stated to shew that the prisoner had been duly attainted of the former felony, which had not here been done, as no *place* was stated in the indictment or set forth in the counter-plea, where the offence was committed, from whence the *venue* could appear: nor did it appear that the principal felons were convicted, without which *James Scott*, who was only charged as an accessory, could not be convicted.

The jury on *viva voce* testimony being produced of the fact, found the identity of the prisoner; and the case was saved for the opinion of the JUDGES: whether the counter-plea was, in its present form, sufficient to oust the prisoner of his clergy.

The

The JUDGES were of opinion, that the objections were not material upon the indictment, to which the counter-plea was pleaded. That the defects in the original indictment were *matters of error*, not to be taken advantage of on this counter-plea, and that there was no *material variance* between the copy of the indictment proved and that set forth in the counter-plea. *Leach, Cr. Ca. 3 ed. 445.*

CHAPTER XXXVI.

Of Facts necessary to be stated in an affidavit to put off a Trial.

Rule the First.

THE postponing a trial is not a matter of right, either when the application is made on the part of the prisoner, or on the part of the crown; for in either case, the court in its discretion, even though an affidavit be made, may refuse, or grant the motion. *Fost. 2.*

Rule the Second.

The court in putting off a trial, on an allegation of the absence of witnesses, will take into consideration evidence of the distance from which such witnesses are to be brought.

As in the case of the earls of KILMARNOCK and CROMARTIE, lord BALMERINO, and others, indicted for high-treason, by special commission, at St. *Margaret's-hill*, in the borough of *Southwark*, *June, 1745*, before LEE, C. J.

The several prisoners produced an affidavit, to which they were sworn in court, setting forth, that a material witness or witnesses, naming the witnesses and the places of their abode, would be wanted for their defence; and their counsel, who had been before assigned them, moved

that their trials might be put off for a reasonable time for bringing up their witnesses.

The *attorney-general* (sir *Dudley Ryder*) prayed time to consider of the motion; and thereupon the court adjourned to the next day.

The *JUDGES*, on consultation, agreed that the case of these prisoners differs greatly from the common cases of trials on the circuits, where affidavits of this kind ought to be *very sparingly admitted*. For in circuit trials, the prisoners, from the time of their commitment, may, and ought to be preparing for their defence. The place where they are to be tried is in most cases well known, and they have likewise a reasonable certainty of the time, long before the circuits begin.

But in the present case, the prisoners are to be tried at a great distance from the places where the treasons were committed; and, neither time nor place for their trials can be said to have been certainly fixed, until bills of indictment were found against them, and copies delivered to them, from which time it was incumbent on them to be preparing for their defence, and getting their witnesses to town.

And in regard that the *affidavits* mentioned the witnesses to reside at different distances from town, some in England, and others in Scotland, it was thought reasonable, in fixing the times of trial, regard should be had to the several distances.

Rule the Third.

But in collateral issues, where the *venire* is awarded and granted *instantly*, the court will not put off the trial of the issue, unless very special grounds be laid before the court.

As in the *KING v. CHARLES RATCLIFFE*, *Mich.* 22 *Geo.* 2. *B. R.* The prisoner being arraigned, he, *ore tenus* pleaded, that he is not the person mentioned in the record before the court. The *attorney-general*, *ore tenus* replied, the prisoner is the same *Charles Ratcliffe*, mentioned in the record, and this "I am ready to verify;" and issue was joined,

The

The prisoner's counsel pressed strongly to put off the trial of this issue, upon an affidavit of the prisoner, which was sworn in court, that two material witnesses, named in the affidavit, are abroad; one of them at *Brussels*, the other at *St. Germain's*, and that he believeth they will attend the trial, if a reasonable time be allowed for that purpose. But,

The court refused to put off the trial, and a *venire* was awarded *instantly*; for, said the court, this proceeding is in the nature of an inquest of office, and has always been considered as an instantaneous proceeding, *unless proper grounds for postponing the trial be laid before the court.* It was so considered in the *King v. Barkstead*, and others, upon the same issue as this is. A *venire* was awarded, and jury returned and sworn *instantly*, to try that issue. It was so considered in the *King v. Roger Johnson*. *Kelyng* 13. 1 *Lev.* 61. 1 *Siderf.* 72. 2 *Hale* P. C. 40. 1 *Keb.* 244. 1 *Hawk. P. Cr.* 6 ed. 3, in note.

If Mr. *Ratcliffe* hath any thing to offer, which may give the court reasonable grounds to believe, that his plea is any thing more than a pretence to delay execution we are ready to hear him; the single issue is, whether he be or be not the person mentioned in this record, this is a fact well known to him, and if he is not the person, he might, if he had pleased, have made the matter part of his affidavit; he may do so still, if he can do it with truth; and if he refuseth to give the court this satisfaction touching the truth of his plea, the court doth him no manner of injustice in denying him the time he prayeth. *Fost.* 41, 42, 46.

Rule the Fourth.

The court will not put off a trial on the mere evidence of a formal affidavit, unless there be circumstances to shew that the party applying cannot have substantial justice without the delay he applies for. See Rule 1.

As in the *KING v. LE CHAVELIER D'EON*. *Trinity*, 4 *Geo.* 3. B. R. Information by the Attorney General for a libel on count de *Guerchy*. *D'Eon*, by counsel, moved to put off the trial, on account of the absence of several

several material witnesses, whom he specified in his affidavit: and his affidavit contained the usual assertions requisite for putting off a trial, and particularly that "they were *material* witnesses for him, that he could not safely go to trial without their evidence; and that he had hopes and expectations of procuring their presence by the next *Michaelmas* term."

Upon shewing cause against putting off the trial, it appeared that the libel was not printed or published until *March* or *April*, and that these witnesses went away from *England* to *France* in *November* or *December*. It appeared also, that they were natives of and residents in *France*; that they were in the service of the crown, and that there was no probability of their being sent over, or even permitted to come over to give evidence in behalf of *M. D'Eon*.

The court, after a full hearing, were unanimous that there appeared no sufficient reason for putting off the trial. They granted that in all cases, whether *criminal* or *civil*, and whether the nature of the proceeding be instantaneous or otherwise, a trial shall not be hurried on, as to do injustice to the defendant; an affidavit in *common* form may be sufficient where no cause of *suspicion* appears; but men take such latitude to swear in *common* form, that where a suspicion arises from the nature of the question, or from contrary affidavits, the court will examine into the *ground* upon which the delay is asked; and have in *criminal* as well as in *civil* cases refused to put off a trial, notwithstanding an affidavit in *common* form.

It is necessary therefore in such cases as this, *First*, to satisfy the court that the persons are *material* witnesses. *Secondly*, to shew that the party applying has been guilty of no *laches* or neglect, in omitting to apply to them and endeavour to procure their attendance; and *Thirdly*, to satisfy the court that there is a *reasonable* expectation of his being able to procure their attendance at the future time to which he prays the trial to be put off.

But in the present case all these reasons fail. These witnesses are sworn to be *material*, as the defendant apprehends and believes: but on the contrary it appears negatively

negatively that they *cannot* be material : for as they were gone out of *England* some months before the printing or publication of this book, they could not be constant of the facts of the offence laid in this information. If their knowledge relates to any circumstances that may serve to mitigate the punishment in case he should be convicted, *that* sort of evidence will not come too late after conviction of the offence, and may be laid before the court by affidavit.

But if it should appear upon the case proved at the trial "that the defendant was prejudiced by refusing "this delay," the court would set it right by granting a new trial; which had often been *said* upon like occasions, but *no* case had yet happened where any prejudice appeared to have been done, by the court's refusing, upon particular circumstances, to put off a trial notwithstanding the *formal* affidavit.

As to their having been *sent* out of the kingdom by the count *De Guerchy* himself, on purpose to prevent their giving testimony in the cause which has been alleged, there neither is any proof of it, nor is it possible that it could be so; they were actually gone *before* the fact, which is the subject of the charge, was committed. It is impossible that they could be sent abroad by Mr. *De Guerchy* to prevent their giving evidence in *this* cause, the foundation of which did not exist at the time when they went. If they had been material witnesses for the defendant in this cause, and *had* been sent away by the person on whose account the prosecution has been carried on; *that* indeed would have been a sufficient ground for putting off the trial until they could be had; but here is no pretence for such an insinuation.

Neither does it appear that there has been the least endeavour used by this gentleman, or any on his behalf, to get them over.

And as to any expectation of their returning to *England* by the next *Michaelmas* term, or at *any* future time, there does not seem to be any probability of it; nor does the defendant lay before the court any *ground* of such an expectation. On the contrary, the *reverse* is highly probable: the presumption seems strong that they will *not* come.

come. They cannot be compelled to come, and it does not seem likely that they will be ordered to come for this purpose. These are foreigners, natives, and residents in *France*, and in the actual service of that king, which renders this case quite different from the ordinary cases of *English* witnesses being accidentally gone abroad, or gone for a small time only, and expected to return to their own country, their natural home and residence.

Upon the whole they were clearly of opinion, that the putting off the trial could not tend to *advance* justice, but on the contrary to *delay* it, and therefore discharged the rule for shewing cause why it should not be put off. 3 *Burr.* 1515. 1 *Blackf. Rep.* 512. *S. C.*

Rule the Fifth.

The court will postpone a trial on the affidavit of a medical person, stating that the prisoner is in such a state of health as not to admit his being brought into court.

So ruled in *the King v. Patrick Finny. Commission Oyer and Terminer, Dublin, July, 1797. Ridgeway's Rep. of the trial.* 1.

Rule the Sixth.

Or on satisfactory affidavit that a material witness is dangerously ill and unable to attend: or if it appear that a witness is absent, though duly summoned, the court will put off a trial; but the truth of the allegation in the affidavit is to be judged of by the court.

So determined in the *King v. Finny*, above cited.

In this case the trial having been repeatedly postponed on affidavit, stating the illness of one material witness, and the absence of others, CHAMBERLAINE J. and two other judges who sat with him determined to refer the application to the other judges for their opinion, and adjourned the trial for two days.

CHAMBERLAINE J. SMITH B. present. In this case there has been an application on the part of the prisoner to put off his trial; there was something indefinite as to the time. We understand, however, in substance, that

that it is a motion to postpone the trial until the next commission, because the approach of the term will not admit of a trial if it be put off further than Monday or Tuesday next. So that substantially the question is, whether this motion shall be complied with by putting off the trial until next commission.

Motions of this kind, particularly where the charge against the prisoner is high treason, must always be of the utmost importance; and in consequence of that and some novelty in this case, it was the opinion of two judges with me that this matter ought to be referred to all the judges in town. Nine judges are unanimously of opinion that this motion, in the extent in which it is made, cannot be complied with.

Motions of this sort are always addressed to the sound discretion of the court, founded upon affidavits, but the affidavit is not to be held to contain sufficient ground for putting off the trial merely because it is in common form; the court must be satisfied, *first*, that due diligence has been used to bring the witness whose attendance is sought for; *secondly*, that the absent person would be really a material witness, or at least that the prisoner or other person making the affidavit on his behalf does believe so; and *thirdly*, that there is a reasonable expectation of his being produced at a future day.

He then entered into an examination of all the circumstances attending the prisoner's application to the court. He is charged with high treason, together with sixteen other persons; the information shews he was charged with taking the most active part. They are all complicated in one charge. The defence in all probability is a common one. All but the prisoner have presented petitions under the *habeas corpus* act to be tried; and upon being called up have insisted upon being tried—the prisoner alone is not ready. If they are regular in their petitions (on which I give no opinion at present) they must be tried at this commission, or be discharged. If any shall be tried, the crown will be under the necessity of publishing the evidence against the prisoner, who is charged as the leader in the treason.

He then stated the several postponements, and minutely compared and examined the facts stated in the several affidavits, pointing out variances and inconsistencies, and said that taking all these circumstances together, it was for the consideration of the JUDGES, whether they believed that the allegation of *James May*, being a material witness, was founded or not. And,

The JUDGES were unanimously of opinion, that although a trial should not be pressed forward where there is any danger to the prisoner from his not being prepared, yet that the *truth* of the allegations in the affidavit for putting off the trial must be judged of by them. It is in fact an issue directed to the judges whether the application be made for delay or not. And that there are many circumstances to be collected in this case from *times and dates* of the affidavits, the time of serving the several summonses, the conduct of the prisoner, and his attorney, and the particular situation of the case, as connected with other prisoners, which induce a belief that this application is not what it is professed to be, but is intended either for unnecessary delay, or as a stratagem made use of to compel the counsel for the crown to disclose their evidence, or discharge the other prisoners under the *habeas corpus* act, if they have been regular in their proceedings. The JUDGES having with the utmost attention read all the affidavits, cannot say that this is a fair *bona fide* application, in order to provide necessary evidence for the prisoner.

With regard to the situation of *James May*, it is something extraordinary: on the 13th of December Doctor *Harvey* visited him, when he said he had been confined seven weeks. The Doctor states him to have been afflicted with a chronic head-ach, and that there is not much probability of his recovery, but that he may linger many years. If this motion were complied with from *May's* situation, the prisoner would be intitled, during *May's* life and inability to attend, *toties quoties* to put off his trial.

However, in stating this, I am desired by the JUDGES to say, that if they were satisfied upon the other grounds that that application was necessary to the defence of the prisoner,

prisoner, and fairly made, they, notwithstanding the situation of *May*, might postpone the trial, to see whether it might not please Providence to restore him at some future time.

But upon the whole, they are of opinion, that it is not fit or meet, for the administration of justice, that this application should be complied with, in the extent which is sought. However, the prisoner will have until Monday to prepare for his trial, which will be near eight months after his committal, and two months after the sickness of the witness.

The prisoner was accordingly tried on Monday following, but the jury not giving credit to the principal witness, he was acquitted; and the sixteen other prisoners implicated in the same indictment with him were, upon motion of their counsel, (*Mac Nally*) discharged from gaol, in pursuance of the *habeas corpus act*. *Ridge-way's Rep. of Finny's Trial*, 23.

Rule the Seventh.

THE COURT will put off a trial on an affidavit, either on part of the crown or of the prisoner, stating, that printed pamphlets, &c. have been published and circulated, without the procurement or knowledge of the party applying, whereby the public mind has been prejudiced.

As in the *KING v. the DEAN of St. ASAPH, Spring assizes, Shrewsbury, 1784*. The trial was put off by the crown, on account of recent publications, whereby the minds of the jury might be prejudiced.

So in the *KING v. ROBINSON, BROOKS, and others, commiss. oyer and terminer, Dublin, July, 1792*. The prisoners were indicted for the wilful murder of — *Lyneal*. A juror having been seized with a fit which endangered his life, the trial was prevented from proceeding from necessity, and *DOWNES, J.* discharged the jury. The next day the prisoners being put to the bar, their counsel, *Curran* and *Mac Nally*, moved to postpone the trial to the ensuing assizes, on this ground, that a partial and imperfect account of the evidence given in court on the former day, had gone abroad

through the medium of a newspaper; and therefore from the impression probably made thereby on the public mind, it was to be presumed that the prisoners could not, at present, have the benefit of such an unbiaſſed jury as the juſtice and humanity of the law requires.

The COURT ordered, that an affidavit of the fact ſhould be made, and that one of the newspapers, containing the report of the evidence, ſhould be annexed thereto.

An affidavit was accordingly ſworn by *Robiſon*, one of the priſoners, in which he denied any knowledge of the publication.

Caldbeck, and *George* (now baron of the Exchequer) ſtrongly oppoſed putting off the trial, and the priſoners counſel were proceeding to answer them, but the COURT ſtopped them, being clearly of opinion that the affidavit ſtated ſufficient grounds to put off the trial. *MS.*

FINIS.

INDEX.

A

- ABETTING** and encouraging makes a principal, 527.
——— defined, 534.
- Abettors**, 526.
- Acceptor of bill of exchange** incompetent, 121, 123.
- Accessory** may defend principal, 462, 464.
——— where evidence shews the defendant to be accessory, and not principal, if indicted as principal he must be discharged, 496.
——— how variance affects the accessory, 513.
——— on his trial he may shew the principal's innocence, 466.
——— evidence against, 526.
- Accomplice** competent, 183, 194.
——— before indictment, 195.
——— after indictment, 199.
——— his single testimony sufficient to convict, 195.
——— admitting him a witness discretionary, 203.
——— competent in misdemeanor, 204.
——— evidence against, 526.
- Acts of parliament** when misrecited, 516, 517.
- Admiralty court**, 433.
- Affidavit of wife** may be read to bind the husband, 175.
——— of a person infamous may be read to defend him from a charge, 212.
——— but not in making a charge, *ibid.*
——— to postpone trial, 659.
- Agent**, competency of. See Attorney.
- Aiding**, evidence of, 529.
- Alibi**, a dangerous defence, 467.
- Aliens** competent, 156.
- Answer in chancery**, the original only is evidence in criminal cases, 468.
- Approver**, 183, 184. See accomplice.
——— competent, 183, 184, 185.
——— his confession, 190.

Approver,

INDEX.

- Approver, his single testimony sufficient to convict, 195.
 ——— competent after indictment, 190, 199.
 ——— admitting him discretionary, 203.
 ——— in misdemeanors, 234.
 Approvements, 188.
 Arrests, 517. See Constable, Warrant, Murder.
 Arson, 605, 685.
 ——— there must be evidence of burning, 605.
 Articles in writing, 123.
 Asportation. See Larciny.
 Assault and Battery, 608.
 ——— in church-yard, 608, 609.
 ——— with intent to rob, 609.
 Atheists incompetent, 95.
 Attainder, how it affects competency, 206.
 Attorney not to reveal his client's secrets, 239.
 ——— on what points he may be examined against his client, 240.
 ——— when examined by his client, may be cross-examined to the points, 246.

B

- Bacon (lord) his character, 7.
 Bail not competent in misdemeanors, 59.
 Bank cashier of competent, 121.
 Bankrupt incompetent until certified, 114.
 Baron and Feme, when witnesses for or against each other, 160.
 Barreter incompetent after judgment, 209.
 Barrister, when incompetent, 239.
 Bastard concealing, death of, 580.
 Battery. See Assault.
 Belief not evidence, 262.
 Benefit of clergy, its effect, 213.
 Bequest destroys competency, 117.
 Bill of exchange, party to, incompetent, 120, 123, 143.
 Bill of exceptions cannot be taken on pleas of the crown, 325.
 Bond, obliger of, incompetent, 142. See Release.
 Bondsman incompetent, 156.
 Books, when evidence, 359, 475.

Books

INDEX.

Books of the Navy-Office, 475, 476, 477.

— of a gaol, 477.

— of a king's ship, 475.

— of a bank, 475.

— of a prison, 477.

— of herald office, 479.

— of corporation, 478, 479.

— copies of, 358.

Breaking. See Burglary.

Bribery, 652.

Broker, 128. See Insurance.

Burglary, 600.

Burnet (bishop), his objection to the stat. 7 Will 3. 33.

Burning in the hand restores competency, 213, 317.

— dispensed with by statute, 229.

— houses, 605. See Arson.

C.

Carnal knowledge. See Infant, Rape, Buggery.

Carrying away. See Larceny.

Cashier of a bank competent, 121.

Chance Medley, 553. See Murder.

Chancery, answer in, original only evidence, 468.

Character, evidence of, 320.

— always admitted *in favorem vite*, 320.

— extended in Ireland to misdemeanors, 320.

— a witness may assign his reasons, 320.

— if defendant's character be put in issue by the prosecution, particular facts are evidence, 324.

— prosecutor cannot examine to defendant's character, unless defendant enable him, 324.

— then prosecutor cannot examine to particular facts, 324.

— of a witness can only be impeached by general accounts, 324.

— party cannot discredit his own witness, 325.

Cheats, the party suffering incompetent, 144.

— evidence to support indictment, 637. See Fraud.

Children, when competent, 149.

Children,

INDEX.

- Children must be sworn, 150.
- competent against parents, 181.
- Church and church-yard, assaulting in, 608.
- Clerk of grand jury cannot be examined, 253.
- Clergy, benefit of, 213.
- Coke (lord) his brutal conduct, 40.
- Comparison of hands, 394.
- Competency distinguished from credit, 15, 16, 107, 111.
- courts lean against objections to competency, *ibid.*
- restored by pardon, 136.
- and by clergy and burning in the hand, 213. See Witnesses.
- Coining, one witness sufficient in, 32.
- evidence of, 543.
- when not treason, 656.
- repeating the offence, *ibid.*
- Compulsory process for witnesses, 335.
- Concealment in treason is misprision, 30, 253.
- Concealing birth of bastard Child, 580.
- Confession at common law, 37, 39, 40, 51.
- before a magistrate by statute, 37, 38, 40, 50.
- before a privy counsellor, 39.
- in high treason, 268.
- facts discovered by, 47
- by torture, 275.
- from hope, 45, 47.
- from fear, 47.
- from expectation of reward. See Reward.
- of one person cannot be read against another, 40.
- before a magistrate does not destroy competency, 40.
- Confidential secrecy not binding on witnesses, 247.
- Conspiracy, judgment in, destroys competency, 209.
- evidence of, in treason, 610.
- in other cases, 610, 633.
- Consequential interest, 105.
- Constable, sufficient to prove he acted as such, 488.
- his appointment need not be produced, 488.
- See Murder.

Constable

INDEX.

- Constable under protection of the law, 569.
- Conversation of prisoner, evidence, 361.
- Convict, his declaration not evidence, 387.
- Convicted persons, the competency of, 206.
- Conviction of principal evidence against accessory, 464.
- Copies, where evidence, and where not, 355, 356, 358,
359.
- Coroner, depositions before, 284. See examination.
- Corporal oath defined, 8.
- Corporator competent, 129.
- Corporation papers not evidence, 359.
- Courts, their judgment evidence, 427.
- court rolls, 356.
- Counsel, See Attorney.
- County, where evidence may be given out of the county,
503.
- inhabitant of, when incompetent, 60, 61.
- Credit distinguished from competency, 15, 16, 107, 111.
- Crimen falsi*, 206. See Infamy.
- destroys competency, 209.
- Crown summons, 335.
- Custom-house officer, proof that he is reputed sufficient,
487.

D

- Day, certainty of, need not be proved, 496.
- Deaf and dumb witness competent by signs, 156.
- Declarations of dying persons, 174.
- of a prisoner in conversation evidence against
but not for him, 361.
- exception to the rule, 361.
- of a convict not evidence, 387.
- in conspiracy, &c. 611.
- Decyphers may give evidence of a paper, 420.
- Deeds, parties to, incompetent, 123.
- Depositions before justices, 49, 284.
- before the coroner, *ibid.*
- before the privy council, 39.
- Discretion, what constitutes, 149, 150.
- Doubts should acquit, 3.
- Dissenters competent, 96, 97.

I N D E X.

Drawer of a note incompetent, 120.
 Dumb, 156. See deaf and dumb.
 Durefs does not destroy competency, 145.
 Dying declaration, 174, 381, 387.

E

Ecclesiastical court, 427. See Judgment, Sentence, Court.

Emission. See Rape.

Enter. See Rape, Buggary.

Evidence defined, 1, 2.

- _____ doubtful, 2, 3.
- _____ must be opened, 14, 282.
- _____ must be in prisoner's presence, 14.
- _____ *ex parte* cannot be read on trial, 15.
- _____ hearsay not admissible, 25, 360.
- _____ at common law still admissible in treason, 34, 505.
- _____ the best must be produced, 342.
- _____ collateral admissible, 34.
- _____ no distinction between evidence on civil and criminal cases, 380.
- _____ parol, 341.
- _____ written, 393.
- _____ on oath always for the king, 9.
- _____ when allowed for the prisoner, 12.
- _____ in treason, 28, 29, 505.
- _____ by medical men, 329.
- _____ to support an indictment, 493.
- _____ to support general issues, 493.
- _____ must bring the offence within the statute on which party is indicted, 494.
- _____ when given out of the county, laid, 503.
- _____ of treason at common law, 505.
- _____ against principal in the second degree, 525.
- _____ the same when indictment is on a stat. as at common law, 525.
- _____ against aiders and abettors, 526, 542.
- _____ distinguished from overt-acts, 543.
- _____ on coining, 543.

Evidence

INDEX.

Evidence of justification, &c. lies on the prisoner, 546.

- _____ of malice, 546.
- _____ in murder, 553 to 570.
- _____ in manslaughter, *ibid.*
- _____ in other homicides, *ibid.*
- _____ in petty treason, 574.
- _____ on statute against stabbing, *ibid.*
- _____ presumptive, 577.
- _____ of concealing birth of bastard child, 580.
- _____ in larceny, 586.
- _____ of robbery, 594.
- _____ of stealing privately, 599.
- _____ in burglary, 600.
- _____ of breaking, 600.
- _____ of entering, 601.
- _____ in arson, 605.
- _____ in rape, 606.
- _____ of marriage by force, 606.
- _____ of threatening letter, 607.
- _____ in assault and battery, 608.
- _____ in conspiracy, 610.
- _____ in perjury. See Perjury.
- _____ forgery, 637.
- _____ against cheats, 637.
- _____ in libel, 642.
- _____ exculpatory, 642, 649.
- _____ in mitigation of sentence, 649.
- _____ of bribery, 652.
- _____ in malicious mischief, 655.
- _____ in coining copper money, 656.
- _____ on plea of clergy, 657.

Examinations before magistrate or coroner, 49, 284.

- _____ cannot be read in misdemeanor, 651, 283.
- _____ may be read where party is dead or unable to travel, 285.
- _____ or detained by means of prisoner, 286, 292, 316.
- _____ may be read for prisoner as well as for the crown, 288.
- _____ may be compared with the evidence given on trial, 290.

INDEX.

- Examinations may be taken in treason, and certified by magistrates, 292.
 ——— their substance must be proved to have been truly taken, 293.
 ——— instances where read, though *viva voce* evidence could be had, 294.
 ——— if not judicially taken cannot be read, 296.
 ——— may be transmitted as evidence from one county to another, 314.
 ——— if sworn before another jurisdiction, not evidence, 314.
 ——— cannot be read in England on trial for high treason, 315.
 ——— may in Ireland, 315.
 ——— these rules dispensed with by the Commons in Fenwick's case, 316.
 ——— in Ireland may be read by stat. where party is put to death or kept out of the way, 319.
 Exception, 325. See Bill of.
 Excise-officer. See Custom-house.
 Excommunication, 427.
 Exculpatory evidence in libel, 649.
 Exemplification of English courts, 427.
 ——— prove themselves, *ibid.*
 ——— of foreign courts, *ibid.*
 Expences of witnesses, 337.
 Experts. See Medical Men, 329.
 Extremis, evidence in, 174, 381.

F

- Facts discovered by confession evidence, 47.
 False is implied in malicious, 650.
 Falsehood not essential to a libel, 649.
 Fear, putting in, 597. See Robbery.
 Felony destroys competency, 206.
 Feme de jure not competent against her baron, 161, 171.
 ——— de facto competent, *ibid.*
 Female infant, carnal knowledge of. See Children.
 Fenwick, evidence on his impeachment, 29.
 Foreign courts, their judgment evidence, 428.
 Forcible marriage, 161, 171.

Forgery

INDEX.

Forgery destroys competency, 120, 121, 141, 206.
—— unstamped paper, evidence in, 481.
—— evidence to prove, 637.
—— variance fatal in. See Variance.
Fraud. See Cheat.

G

Gaol books evidence, 477.
Gaolers protected like other officers, 573.
Gazette evidence, 479.
General issue, evidence to support, 493.
Gentoos competent, 64.
Grand jury clerk cannot be examined, 253.
—— larciny. See Larciny.
Great seal, only evidence of pardon, 130.

H

Hand-writing. See comparison of hands.
—— proof of the same in criminal as in civil cases, 417.
Hearsay not evidence, 360.
—— may be used as inducement or illustration of, *ibid.*
Heralds books evidence, 476.
Homicide, 552.
—— excusable, 554.
—— justifiable, 559 to 580. See Murder.
House of Lords, copies of their minutes and judgments 357.
House burning, 685. See Arson.
Hue and Cry, 576. See Murder.
Hundreders competent, 61.
Husband and wife, when admitted witnesses for or against each other, 161.

I

Idiots incompetent, 158.
Idolaters competent, 64, 95.
Impeachment of Fenwick, 29.
Implied malice, 550.
Indictment, evidence to support, 493. See Evidence.
Indorser of note or bill not competent, 120, 143.
Informations,

INDEX.

- Infamous persons incompetent, 206.
 ————— how restored to credit, 213.
 Infant. See Children, 149, 150.
 Infidels competent, 95.
 Influence goes only to credit, 111.
 Informations, 282.
 Informer competent, 60.
 Inquisitions, when evidence, 284.
 Insurance-broker, when competent, 128.
 Interest, how it affects competency, 59, 60.
 ————— difference between interest and influence, 105.
 ————— immediate, affects competency, 60, 105, 117,
 124, 128, 139, 143.
 ————— remote, its effects, *ibid.*
 Interested witnesses, 52, 139.
 Ireland never obtained the statute of treason, 7 Will. 3.
 274.
 Issue may be sent to the jury on one prisoner when two
 are on trial, 56.
 ————— such prisoner if acquitted is rendered competent,
 56.
 ————— the evidence must be confined to the issue.
 Judges competent witnesses, 237.
 Judgment must pass to destroy competency, 211. Vide
 Record, Conviction, Attainder.
 ————— (final) of a court evidence, 428.
 ————— of foreign courts, *ibid.*
 Jurors competent witnesses, 328.
 Jury, clerk of grand, must keep their secrets, 253.
 ————— not Judges of malice, 548.

K

- King. See Sign manual.
 ————— his pardon. See Pardon.
 Knowledge not evidence, 262.
 ————— except from professional men, *ibid.*

L

- Larceny, 586.
 ————— from the person, 594.
 ————— petit, 230.

Legacy

INDEX.

- Legacy destroys competency, 117.
- Letter, threatening, 607.
- Levying war in any county, evidence of compassing, 504.
- Libel, 642.
 - statute regulating the trial of, 651.
 - exculpatory evidence in, 649.
 - must be proved in the county laid, 651.
- Lords, how they are to give evidence, 158.
 - have no privilege as witnesses, 248.
- Lunatics, when competent, 158. See Idiots.

M

- Mahometans competent, 95.
- Magistrate, how he should take confessions, 39. See Examination.
- Malum in se.* See Murder.
- *prohibitum.* See Murder.
- Malice, 546.
 - defined, 548.
 - express, *ibid.*
 - implied, *ibid.*
 - the court, not the jury, judges of it, *ibid.*
 - in libels, 650.
- Malicious implies false, 650.
 - mischief, 655.
- Manlaughter, 553 to 583.
- Marriage, evidence of, forcible, 161, 171.
- Master incompetent witness for servant, 120.
 - answerable for his acts, 642. See Libel.
- Medical men, evidence by, 329.
- Memorandums may be used by a witness, 263.
 - exception to this, 265.
- Minutes of the Lords, 357.
- Mischief malicious, 655.
- Misprison of treason, evidence of, 30.
 - concealment is misprison, 253.
- Misrecital, where fatal, 516. See Variance.
- Murder, 552.
 - words essential to the indictment, 553.
 - facts which constitute the crime and support the indictment, 553 to 580. See Manlaughter, &c.
- Must book of a ship, evidence, 475.

Navy-

INDEX.

N

- Navy-office-book evidence, 475.
- Night, 600. See Burglary.
- Note, indorser of, or other parties to, not competent,
120, 123, 143.
- Notice on prisoner to produce papers in his custody, 350.
- , if not produced, secondary evidence may be
given, *ibid.*

O

- Oath defined, 8.
- several kinds of, 9.
- Obligor of a bond incompetent, 142.
- Office copies, when evidence, 355.
- Officers of justice. See Constable, Warrant, Custom-
house, Excise.
- under protection of the law, 569.
- Opinion when evidence, 262. See Belief.
- Overt-act written papers, 421.
- levying war, 504, 505.
- no evidence can be given of an overt-act not
in the indictments, 505.
- manner of proving, 510.
- distinguished from evidence, 543.

P

- Pagans competent witnesses, 64, 95.
- Papists competent witnesses, 97.
- Pardon by the king restores competency, 237.
- it not only respites punishment, but absolves
from the crime and restores, 233.
- but where disability is, by statute, and part of
the judgment, pardon does not restore, 235.
- by statute, 237.
- to restore competency, must be under the great
seal, 230. See Sign manual.
- promise of, though under sign manual, does not
restore to competency, 148.
- in manslaughter, 226.
- Parents competent against children, 181.
- right to chastise, 556.

Parishioners

INDEX

- Parishioners, 128.
- Parish register evidence, 356.
- Parol evidence, 341.
 - not admitted to contradict written, 344.
- Party to a security competent, 123, 124.
- Particeps criminis.* See Accomplice and Approver.
- Peers how examined, 158.
 - entitled to clergy without burning in the hand, 225.
 - have no privilege as witnesses, 248.
- Perjury, two witnesses necessary in, 37.
 - the party injured incompetent under the statute, 143.
 - not so at common law, *ibid.*
 - *posita* of the former issue evidence, 468.
 - original answer must be produced, 470.
 - and proved, 470.
 - evidence to support indictment in, 635.
 - variance in. See Variance, Subornation.
- Petit treason, 30, 36.
 - evidence in, 574.
 - larceny, conviction of, destroys competency, 230.
- Petit larceny disability removed by statute, 230.
- Pillory, 206 See Infamy.
- Place, how far material, 500.
- Poisoning. See Medical men.
- Poisonous recusant, how admissible, 99.
- Posita* of former issue, evidence in perjury, 468.
- Presumptive evidence, 577.
- Principal in second degree, 523. See Murder. See Accessary, 496.
- Printing, 641. See Libel.
- Prisoner, not formerly allowed witnesses, 6.
 - allowed witnesses and process, 10, 13.
 - evidence must be in his presence, 14.
 - his confession evidence, 40.
 - his conversation evidence, 40, 41.
 - should not be sworn before a magistrate. See examination.
 - what he has sworn on one trial not evidence against him on his own, 390.
 - if he refuses papers in his possession, secondary evidence will be received, 348.

INDEX.

Privately stealing from the person, 599.
Privilegium clericale, 213.
 Privy counsellor, confession before, 39.
Probus et legalis homo, 219, 227, 229.
 Process allowed to witnesses for prisoner, 10, 13.
 Promises bar evidence by confession, 42.
 Proprietor of stock, when competent, 143.
 Prosecutor incompetent from interest, 54.
 Priest not exempt from giving evidence, 253.
 Protestant association, 71, 97.
 ——— Dissenters, 96, 97. See Dissenters.
 Public officer, when he must shew warrant, 485.
 ——— sufficient to shew he acted.
 Publication, 642. See Libel.
 Process for witnesses, 335.
Prochein amy incompetent, 60.
 Professional men may give evidence from knowledge or skill, 263.
 Promise of pardon does not restore competency, 230.
 Proprietor of stock incompetent, 143.
 Proof, 1.
 Proximity of blood, how it affects competency, 160.

Q

Quakers incompetent in criminal cases, 100.
 Quality of evidence, 342.

R

Rape, 606. See Infant.
 Receipt, the signer, incompetent, 143
 Record, evidence by, 427.
 ——— must be produced to prove infamy, 212, 230.
 ——— of conviction is conclusive evidence to bar competency, 463.
 ——— variance between record and evidence, 512.
 Recusants Popish, 99.
 Register of marriage.
 Release restores competency, 142. See Interest.
 Religion, professors of any, competent, 88.
 Remission, charter of, 223, 233. See Pardon.
 Reputation. See Character.
 Restoration, charter of, 223, 233. See Pardon.
Restitution

INDEX

Restitution of good, 53, 54.
 Reward, 61.
 Robbery from the person, 594, 595.
 ——— from the house. See Burglary.
 ——— assault with intent to commit, 609.
 Roll of court-baron, 486.
Sacramentum, 8. See Oath.

S

Scotch covenanter competent, 97.
 Seals of superior courts prove themselves. See Record, Judgment.
 Securities for money, parties to, incompetent, 121, 122, 123.
 Sentence of foreign courts, evidence, 427.
 ——— of a spiritual court not conclusive, 430.
 Secretary of state, confession before, 39.
 Self-defence. See Murder.
Serement, 8.
Serment, *ibid*.
 Servant, when answerable. See Libel, 642.
 Sign manual does not restore competency, 231.
 Signs, evidence from persons deaf and dumb, 156.
 Similitude of writing, 394.
 Solicitor not to reveal clients secrets, 240.
 Special verdict must find facts, 256.
 Spiritual court, See Sentence.
 Stabbing act, 574.
 Stamps, 480.
 State trials, their character, 26.
 Statutes, hearsay evidence by
 ——— for examining on oath, 13.
 ——— indictment on, 494, 525.
 ——— of treasons, 15, 21, 38.
 ——— of Philip and Mary, 38, 50.
 ——— of William 3. *Ibid*.
 ——— when misrecited, 516, 517.
 Stealing privately from the person, 599.
 Still-born child, 581. See Symptoms.
 Stock, proprietor of, 143.
 Stuarts, trials in their reigns, 295.
 Subornation of perjury, 636.

INDEX.

Symptoms of poison. See medical men.
 _____ of child being still born, 581.

T

Taking, what amounts to, 588.
 Temerary, 577. See Presumption.
Tessie, 1.
 Threatening letter, 607.
 Time, 496. See Day.
 Torture, 275.
 Treason (high) number of witnesses required in, 36.
 _____ levying war in any county, evidence on an indictment for compassing, 504.
 _____ evidence of at common law is received on indictment for treason on the statute, 505, 543.
 Treason (petit) witnesses required in, 30, 36.
 _____ evidence to support an indictment in, respecting the coin, 36.
 Trials (state) their character, 26.
 _____ for treason shall be by course of common law, 28.
 _____ oppressive, one cause of the revolution, 29, 30.
 _____ affidavit to postpone, 659.
 Tudors, trials in their reigns, 285
 Turks competent, 95.

V

Variance in testimony of a witness on different trials may be given in evidence, 291.
 _____ in the day laid immaterial, 499, 500.
 _____ as to the place, 500.
 _____ between the written evidence given and the record, 511.
 _____ where a public statute is set forth, variance is fatal, 516.
 _____ between circumstances set forth in the indictment and those given in evidence, 520.
 _____ as to the instrument, *ibid.*
 _____ or other means laid, 521.
 _____ how it affects accessaries and abettors, 539.
 _____ between the special, circumstances in indictment and the evidence not fatal, 552.
 Variance,

INDEX.

Variance, how it affects the accessory or abettor, 539.
 Verdict (special) is not to find evidence, but facts, 526.
 ——— where evidence.
 Verulam (lord), his character. See Bacon.
 Villeins competent, 156.
 Violent presumption, 577.
 Voluntary burning, 605.
Voir dire, 109, 113, 114, 116, 140, 145.
 Usury, party to the contract, incompetent, 60.

W

Warrant, when it must be shewn in evidence, 485, 489.
 ——— if irregular, does not justify homicide, 488.
 ——— persons executing, protected, 571.
 ——— blank warrant, 489.
 Witness defined, 1.
 ——— the oath of, 1.
 ——— can only give evidence to the point in issue, 2.
 ——— his credit should be doubted, *ibid.*
 ——— necessary number in treason, by statute, 15.
 ——— not allowed a prisoner, 6, 10, 13.
 ——— when allowed, *ibid.*
 ——— at common law, 30, 31, 32.
 ——— in Ireland, 31.
 ——— where no corruption of blood, 35.
 ——— always examined for the crown, 290.
 ——— may now be examined for the subject, 10, 13, 290, 296.
 ——— not bound to accuse themselves, 256.
 ——— but must answer to the fact of suffering for an infamous crime, 258.
 ——— not bound to shew their own turpitude or infamy, 123, 258.
 ——— but must answer whether he has been charged with an offence, *ibid.*
 ——— must not depose from his knowledge, thought, or belief, 262.
 ——— may refresh his memory from written memorandums, 263.
 ——— his character can only be impeached by general accounts, 324.

Witness

I. N. D. E. X.

- Witness** not to be discredited by the party calling him
 by general evidence, 325.
 ——— but other witnesses may be called to prove particular facts, 325.
 ——— process to compel attendance, 335.
 ——— if in execution, must be brought up by *habeas corpus*, 336.
 ——— now in Ireland by rule of court, 337.
 ——— may be allowed their expences, *ibid.*
 ——— refusing to give evidence, a contempt, *ibid.*
 ——— what he has said on a former occasion is evidence to confirm or invalidate, 378.
 ——— evidence may be given of witness's consistency, 379.
 ——— may explain his evidence, 388.

Who may be witnesses :

- Infants having sense of religion, 149, 150.
 Deaf and dumb, 156.
 Convicted person not infamous, 206.
 Petit larciny, 230.
 —— person convicted of, *ibid.*
 Infidels, not atheists, 96.
 Quakers, in civil cases, 100.
Particeps criminis, 183, 194.
 Approvers, 183.

Who may not be witnesses :

- Atheists, 95.
 Quakers, 100.
 Idiots, 156.
 Lunatics, 158.
 Infants without sense of religion, 149.
 Convicts on infamous crimes, 206.
 Husband against wife, 161.
 Wife against husband, *ibid.*
 Barrister, 239.
 Attorney, *ibid.*
 Solicitor, *ibid.*
 Agent, *ibid.*

Interested

INDEX.

Interested persons, 59, 60.

Writ, must be produced in evidence, 489, 490.

Written evidence, 393.

———— Comparison of writing, 394.

———— Papers found in custody of prisoner, 403, 421.

Written, same proof of hand-writing in criminal as in civil cases, 417.

———— paper published by prisoner, 421.

———— attempted to be transmitted, *ibid.*

———— may be explained by the party swearing, 474.

———— Writs, authorities, warrants, &c: 489, 490.

———— when they must be produced, 485. *Vide Records, Deeds, &c.*

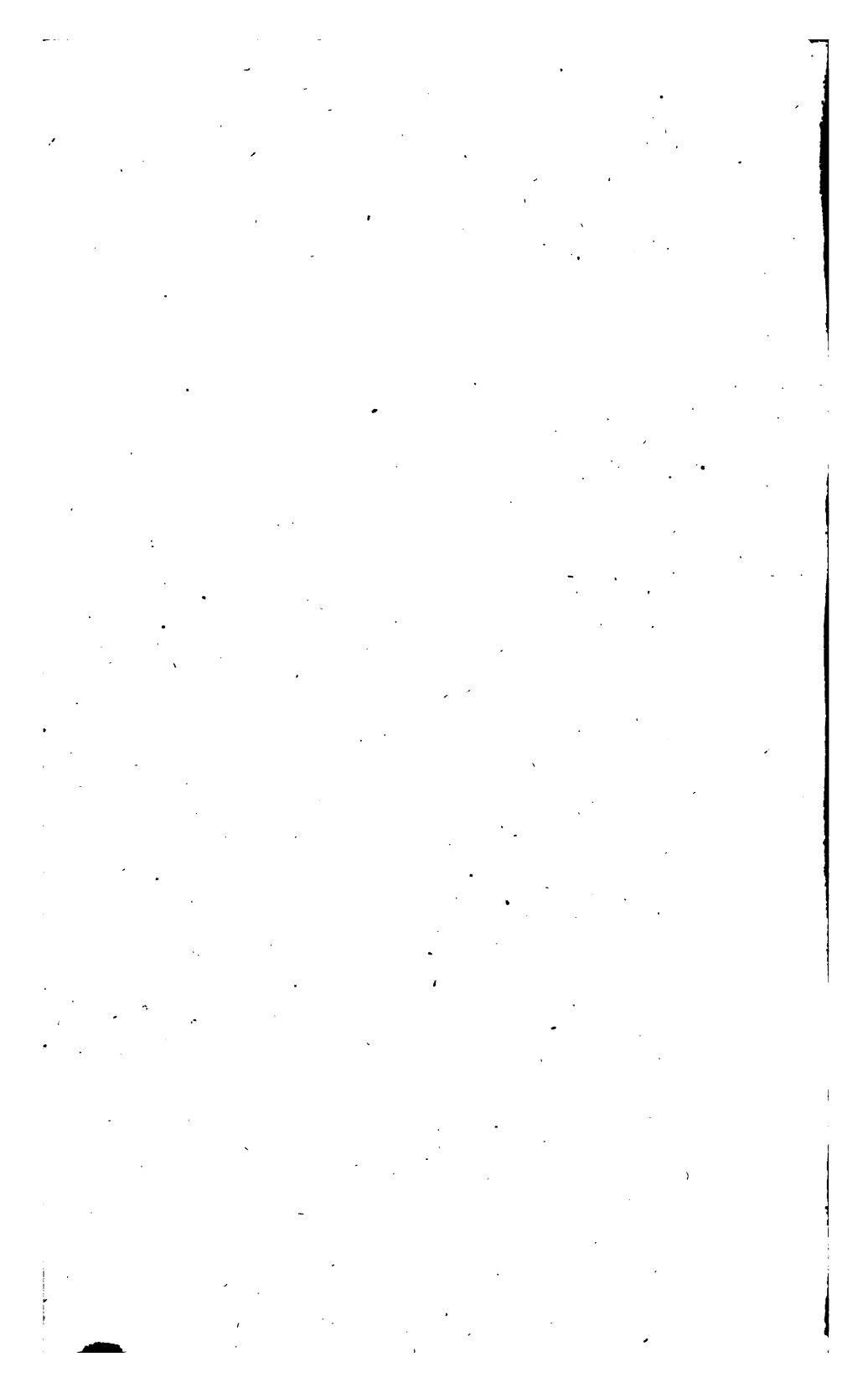
———— securities, parties to, incompetent, 123.

———— security may be impeached by party thereto, 123, 124.

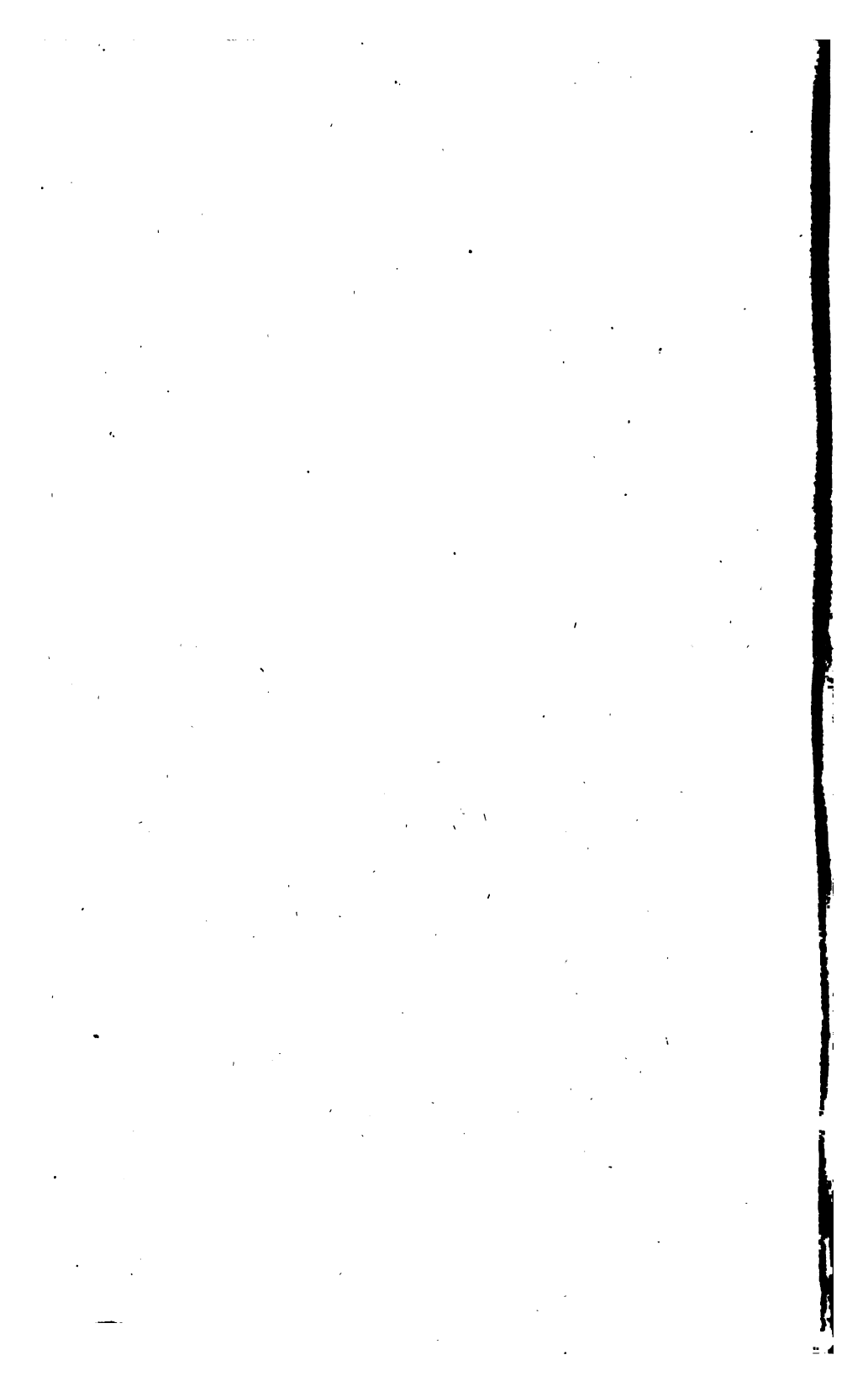
Words, evidence of, must be certain, 518.

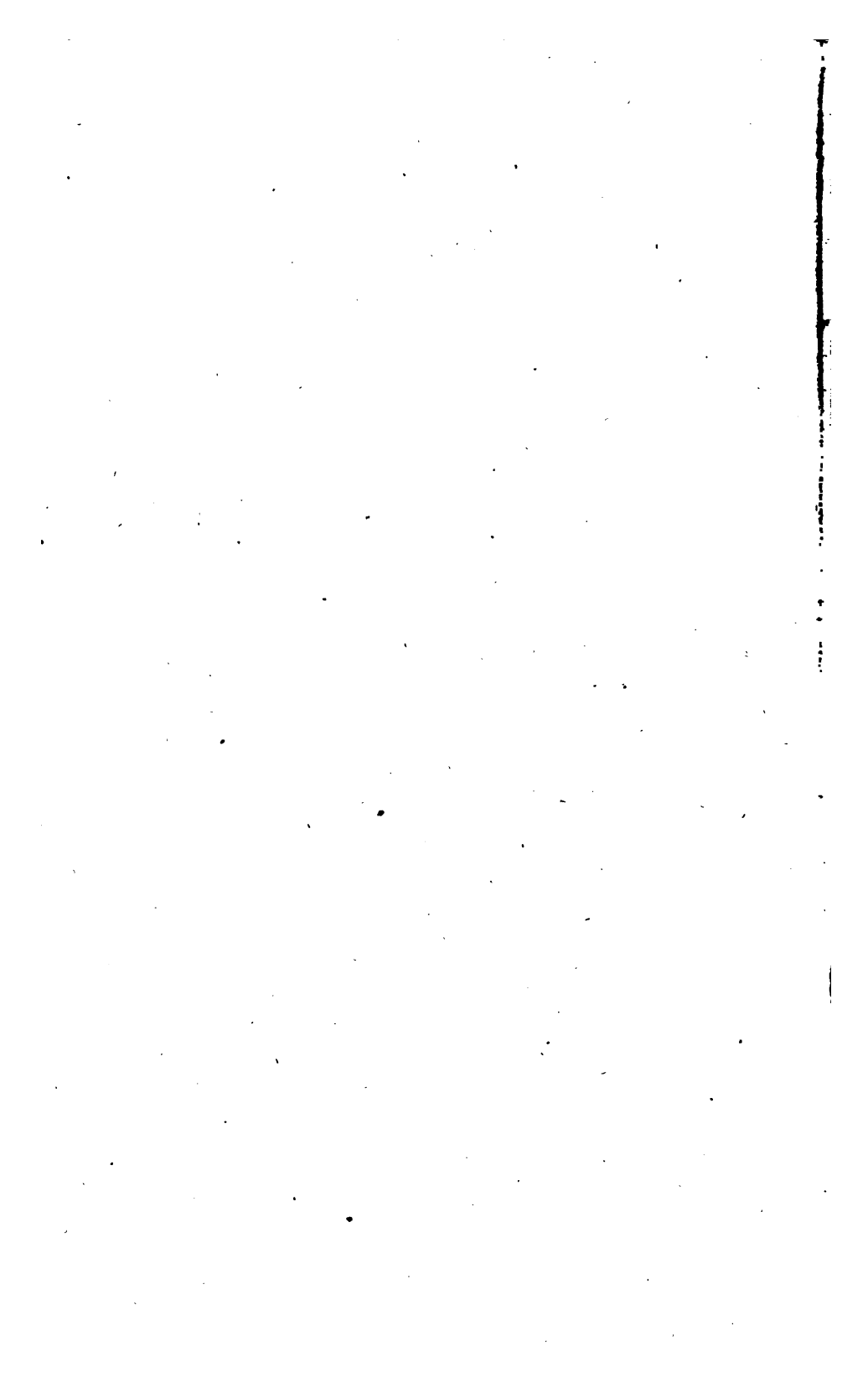
———— evidence of compassing the king's death, 543.

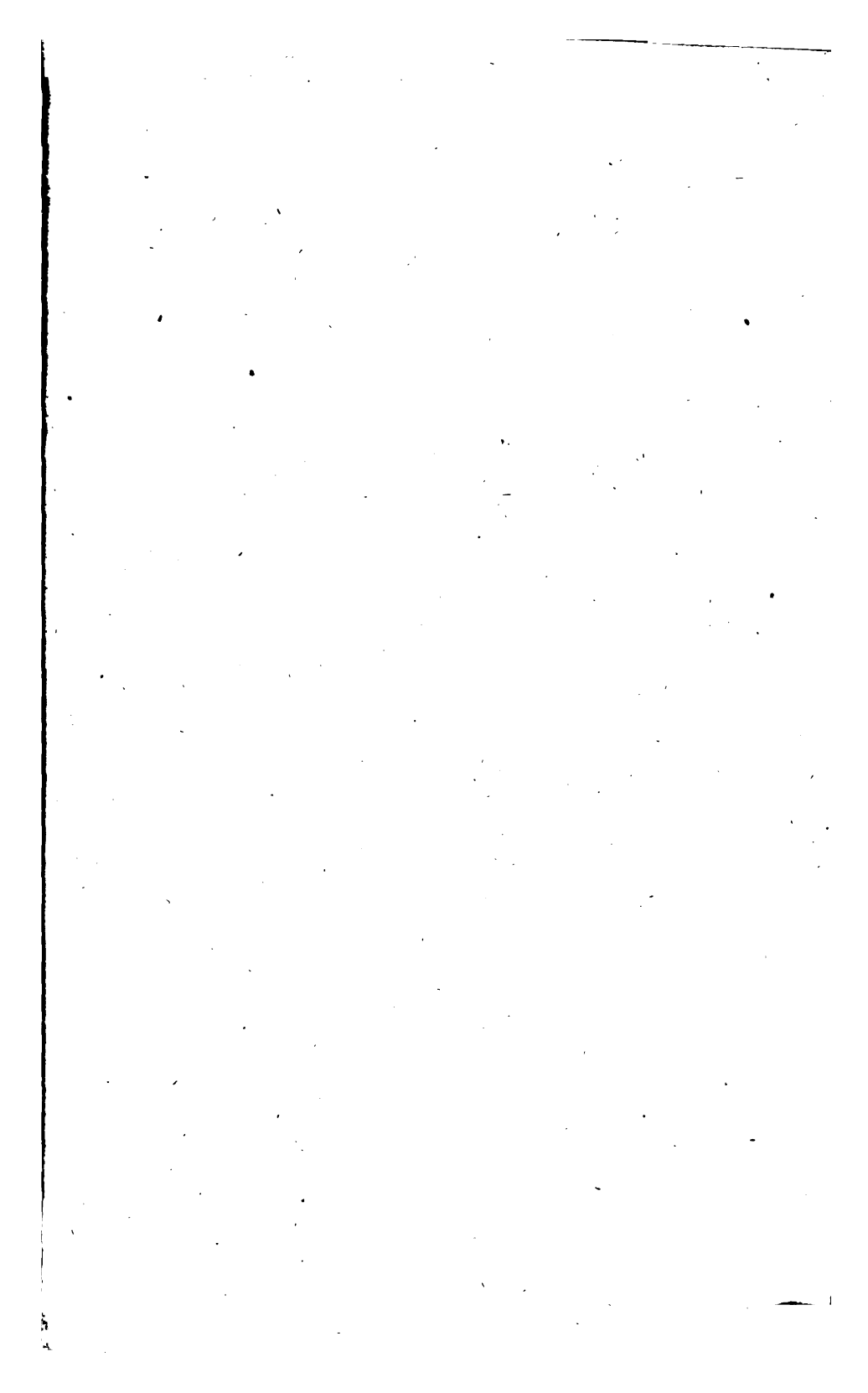
———— no provocation to justify homicide, 564.















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